SERVED: October 24, 2011

NTSB Order No. EA-5601

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 day 24th of October, 2011

APPLICATION OF FRANK J. BORDELON For an award of attorney fees and expenses under the Equal Access to Justice Act	)	Docket 351-EAJA-SE-18931

OPINION AND ORDER

1. *Background*

The Administrator has appealed from the Equal Access to Justice Act (EAJA) written amended initial decision and order of Administrative Law Judge William R. Mullins, served on March 8, 2011.[1] By that decision and order, the law judge granted applicant's EAJA[2] application

[1] Copies of the law judge's written amended initial decision and order granting the EAJA application and order terminating the proceedings with prejudice are attached.

[2] 5 U.S.C. § 504; see also 49 C.F.R. part 826. Applicant now seeks additional fees for the 17.9 billable hours spent responding to this appeal. Attachment D to Reply Br. at 27.

for an award of $28,569.39 in attorney's fees and expenses, based on a finding that applicant was the prevailing party in the underlying appeal and the Administrator was not substantially justified in pursuing charges that applicant violated 14 C.F.R. §§ 43.9(a)(2) and (a)(4)[3] and 43.13(a) and (b)[4]. The Administrator appealed. We deny the Administrator's appeal.[5]

Applicant holds a mechanic certificate with airframe and powerplant (A&P) ratings. He was employed as a mechanic for Auburn Flight Services (AFS) in Auburn, Washington. In January 2010, Shane Sullivan brought a Cirrus SR22 ("N224GS") to AFS for its annual inspection and maintenance. While N224GS was at AFS, four mechanics, including applicant, performed maintenance on the aircraft. The various mechanics working on the aircraft allegedly noted the maintenance in work orders but never recorded the maintenance in the aircraft logbooks. On February 3, 2010, applicant performed maintenance on the engine requiring removal of the cap assembly. The AFS director of maintenance (DOM), Greg Woodruff, signed the airworthiness certificate returning the aircraft to service on February 5, 2010. On March 19, 2010, N224GS was involved in an accident, fatally injuring Mr. Sullivan and injuring his passenger. During the accident investigation, Federal Aviation Administration (FAA)

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[3] Subsections 43.9(a)(2) and (4) require persons maintaining, performing preventative maintenance, rebuilding, or altering an aircraft to make entries in the maintenance record that contain a date of completion of the work performed as well as a signature, certificate number, and kind of certificate held by the person approving the work.

[4] Subsections 43.13(a) and (b) require each person performing maintenance, alteration, or preventive maintenance on an aircraft to use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual, or other methods, techniques, and practices acceptable to the Administrator, and to do the work in such a manner and use materials of such a quality, that the condition of the aircraft will be at least equal to its original or properly altered condition.

[5] We find applicant established his eligibility for an award under 49 C.F.R. § 826.4 since he provided documentation that his individual net worth is less than $2 million. The Administrator does not contest applicant's eligibility.

investigators determined a cap assembly had come loose and lodged in a different part of the engine, causing the accident.

The Administrator subsequently issued an emergency order on August 19, 2010, which later became the complaint in this case, seeking revocation of applicant's mechanic certificate with A&P ratings based upon applicant's alleged failure to make appropriate entries in the aircraft logbook and alleged failure to perform maintenance in accordance with the proper methods and techniques in violation of 14 C.F.R. §§ 43.9(a)(2) and (a)(4) and 43.13(a) and (b).[6] The law judge set the hearing date for September 21, 2010. During a deposition on September 16, 2010, applicant admitted removing the cap assembly and not reinstalling it, but maintained the assembly needed to be left apart for subsequent inspection by a mechanic with inspection authority (IA). Mr. Woodruff, the DOM with IA, and James Bartley, an A&P mechanic with IA, also denied reinstalling the cap assembly.

The Administrator moved to withdraw the complaint, without prejudice, on September 20, 2010. Applicant filed a motion to terminate the proceedings with prejudice the following day. The law judge granted the withdrawal of the complaint with prejudice on September 30, 2010.[7]

Subsequently, applicant submitted an application for fees under the EAJA, which the law judge granted, based on the law judge's conclusion that applicant was the prevailing party and the Administrator was not substantially justified in pursuing the case. In reaching his decision as to the prevailing party issue, the law judge applied the three-part test that the Court of Appeals

[6] This emergency order became immediately effective.
[7] The Administrator did not appeal the law judge's order.

for the District of Columbia Circuit set out in District of Columbia v. Straus.[8] The law judge distinguished the case at hand from the case of Application Turner and Coonan.[9] He noted since Turner and Coonan did not involve an emergency proceeding, the pilots never surrendered their airman certificates as applicant did here. With the Administrator's return of applicant's mechanic certificate after withdrawing the appeal, the law judge found a change in the legal relationship of the parties and that by dismissing the case with prejudice granted applicant judicial relief.[10] The law judge found the Administrator was not substantially justified in bringing the case. As to the amount of the award, the law judge permitted applicant to recover 148.8 hours of fees and $1,785.39 in expenses, for a total award of $28,569.39.

The Administrator appealed the law judge's order and decision. The Administrator contends the law judge erred in finding applicant was the prevailing party; that the law judge erred in finding the FAA was not substantially justified in bringing this enforcement action; and that the law judge erred in the amount of the award granted under the EAJA.

2. *Decision*

A. *Prevailing Party*

In Turner and Coonan, supra, the Board addressed this issue of defining "prevailing party" under the EAJA. The D.C. Circuit affirmed our decision in Turner and Coonan, but indicated the controlling test is a three-part standard in which a party must prove (1) there was a court-ordered change in the legal relationship of the parties; (2) the judgment was in favor of the

[8] 590 F.3d 898, 901 (D.C. Cir. 2010)("(1) there must be a 'court-ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief.").

[9] NTSB Order No. EA-5467 (2009).

[10] The law judge also noted the FAA chose not to request reconsideration of that determination and did not appeal the order to the Board.

party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief, in order to prove he or she prevailed in the underlying case.[11] Subsequent to the D.C. Circuit's decision, we discussed this test, in dicta, in our decision in Administrator v. Koch.[12] Since Koch was not an EAJA appeal but rather was an appeal of a law judge's order dismissing a case with prejudice, we did not expressly adopt the D.C. Circuit's three-part test in that opinion.

Therefore, this case presents us with the opportunity to adopt a clearly defined test for determining prevailing party status in an EAJA case and necessarily reject all prior Board precedent inconsistent with this test. We hereby adopt the three-part test for determining a prevailing party established by the D.C. Circuit in District of Columbia v. Straus.[13] To determine whether a party has prevailed under the EAJA, "(1) there must be a 'court-ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." Id.

1. *Historical Development of the "Prevailing Party" Concept in Board Opinions and Orders and D.C. Circuit Opinions*

To understand how we reached the decision to adopt this three-part test, we will discuss the historical development of this concept of prevailing party status for purposes of the EAJA under both Board and federal case law. In 1993, the Board observed, "although EAJA does not define 'prevailing party,' the term requires that the final result represent in a real sense a

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[11] Turner and Coonan v. NTSB, 608 F.3d 12 (D.C. Cir. 2010)(citing District of Columbia v. Straus, 590 F.3d 898, 901 (D.C. Cir. 2010)).

[12] NTSB Order No. EA-5571 at 7 (2011).

[13] 590 F.3d 898, 901 (D.C. Cir. 2010).

disposition that furthers [applicant's] interest."[14] In 1996, in Application of Swafford and Coleman,[15] the Board defined prevailing party by stating that "[a]pplicants need only show that they have won 'a significant and discrete substantive portion of the proceeding.' 49 C.F.R. § 826.5(a)."

In May 2001, the United States Supreme Court decision in Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources[16] sought to resolve conflicts between the courts of appeals on fee-shifting provisions in civil litigation. The Court found:

> In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. Although a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered "chang[e] [in] the legal relationship between [the plaintiff] and the defendant." These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees.

Id. at 604.

Relying on Buckhannon, the Board in Turner and Coonan[17] and Application of Air Trek[18] tested for prevailing party status by examining whether the applicants (1) received an enforceable judgment on the merits of the case or (2) obtained a court-ordered consent decree that resulted in a change in the legal relationship between the parties. In Turner and Coonan, the Board stated, "[t]he law judge did not dismiss the case with prejudice or in any way alter the

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[14] Application of Gilfoil, NTSB Order No. EA-3982 at 4 n.2 (1993), citing National Coalition Against Misuse of Pesticides v. EPA, 828 F.3d 42, 44 (D.C. Cir. 1987).

[15] NTSB Order No. EA-4426 at 2 (1996).

[16] 532 U.S. 598 (2001).

[17] NTSB Order No. EA-5467 (2009).

[18] NTSB Order No. EA-5510 (2010).

relationship of the parties."[19] The Board further found, even if Buckhannon did not apply, the applicants still would not have attained prevailing party status because an adversarial adjudication under the Administrative Procedure Act, 5 U.S.C. § 504, had not occurred.

As mentioned, supra, the D.C. Circuit reviewed the Board's decision in Turner and Coonan. The D.C. Circuit made reference to its three-part test from Straus but did not analyze Turner and Coonan under this test as the court agreed with the Board that, as a matter of law, the pilots were not prevailing parties. In dicta, the court indicated its definition of prevailing party was not limited to a two-part test of whether a party had obtained an enforceable judgment on the merits or a court-ordered consent decree:

> We do note that although the NTSB concluded a party prevails only if he receives "an enforceable judgment on the merits of [his] case" or "a court-ordered consent decree that resulted in a change in the legal relationship between the parties," under the test laid out in Straus a party need receive only some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits.[20]

The court also affirmed the Board's conclusion that, since the law judge did not dismiss the case with prejudice, the legal relationship between the parties had not changed and the applicants had not obtained judicial relief.[21] In essence, the court found the Administrator ended the case

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[19] NTSB Order No. EA-5467 at 18 (2009).

[20] 608 F.3d at 15 (citing to several of its own cases as well as cases from other courts of appeals that hold prevailing party status is not so limited)(citations omitted).

[21] Even if the law judge had dismissed the case with prejudice, the D.C. Circuit has held that not every involuntary dismissal with prejudice conveys judicial relief. See Straus, 590 F.3d at 902. In Straus, the court found the District of Columbia was not a prevailing party because "the hearing officer's dismissal protected the District from nothing at all because [the District] had already agreed to pay for the requested evaluation—the only issue then before the hearing officer. In other words, the District's favorable judicial pronouncement was 'unaccompanied by judicial relief.'" Id.

unilaterally by withdrawing the complaint under 49 C.F.R. § 821.12(b) and the law judge simply performed administrative house-keeping by dismissing the case.[22]

2. *Historical Development of the "Prevailing Party" Concept in Other Circuit Courts of Appeals' Opinions*

Since the EAJA is a statute of general applicability, we examined the definition of prevailing party across the courts of appeals to see how other circuits define prevailing party status.[23] Eight of thirteen circuits have held Buckhannon applies to EAJA cases.[24] It appears the remaining circuits have yet to address this issue.

While no other court of appeals has adopted an express three-part test for determining prevailing party like that of the D.C. Circuit, the majority of circuits that have considered the issue have adopted an approach similar to the D.C. Circuit's—viewing Buckhannon as providing examples rather than an exhaustive list of the types of judicial action resulting in prevailing party status.[25]

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[22] 608 F.3d at 16.

[23] Turner v. NTSB, 608 F.3d 12, 14 (D.C. Cir. 2010); see also Bazalo v. West, 150 F.3d 1380, 1384 (Fed. Cir. 1998).

[24] See Consol. Edison Co. v. Bodman, 445 F.3d 438 (D.C. Cir. 2006); Davis v. Nicholson, 562 F.3d 1360 (Fed. Cir. 2007); Aronov v. Napolitano, 562 F.3d 84 (1st Cir. 2009); Stephens ex. rel. R.E. v. Asture, 565 F.3d 131 (4th Cir. 2009); Marshall v. Comm'r of Social Security, 444 F.3d 837 (6th Cir. 2006); Hardisty v. Asture, 592 F.3d 1072 (9th Cir. 2010); Manning v. Asture, 510 F.3d 1246 (10th Cir. 2007); and Morillo-Cedron v. District Director for the U.S. Citizenship and Immigration Services, 452 F.3d 1254 (11th Cir. 2006).

[25] See Rice Services, Ltd. v. United States, 405 F.3d 1017, 1025 (Fed. Cir. 2005) ("[I]n order to demonstrate that it is a 'prevailing party,' an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court-ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those."); Roberson v. Giuliani, 346 F.3d 75, 81 (2nd Cir. 2003) ("We therefore join the majority of courts to have considered the issue since Buckhannon in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur." (footnote and citation omitted)); Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159, 165 (3rd Cir. 2002) (holding an order characterized as a

Only the Eighth Circuit appears to have adopted a narrow reading of Buckhannon. In Christina A. v. Bloomberg, the Eighth Circuit found a party only prevails with an enforceable judgment on the merits or a court-ordered consent decree.[26] Notably, Christina A. was a 2-1 decision with a strong dissenting vote. The dissenting judge stated,

> [t]he [Supreme] Court in Buckhannon did not limit the availability of prevailing party status to only those cases resolved through a consent decree or final judgment on the merits. Rather the Court set forth criteria to guide the analysis of whether there is a judicially sanctioned, material change in the legal relationship of the parties.[27]

Upon examining the case law across the courts of appeals, it appears well-settled that Buckhannon applies to the EAJA. Furthermore, we believe the Board's opinions in Turner and Coonan and Air Trek could be read to indicate we adopt a narrow view of Buckhannon, like that of the Eighth Circuit, to the extent those cases indicate a party may only attain prevailing party

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stipulated settlement conferred prevailing party status because it used mandatory language, bore the judge's signature, and was judicially enforceable); Smyth v. Rivero, 282 F.3d 268, 281 (4th Cir. 2002) ("We doubt that the Supreme Court's guidance in Buckhannon was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly."); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 478 (7th Cir. 2003) ("some settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree."); Citizens For Better Forestry v. U.S. Dept. of Agriculture, 567 F.3d 1128, 1132 (9th Cir. 2009) ("The Supreme Court provided two 'examples' of forms of relief that justify a fee award: enforceable judgments on the merits and settlement agreements enforced through a consent decree. While we have identified additional situations in which a plaintiff can qualify as a prevailing party, we never have undermined the Court's basic requirement that 'some relief' be granted."); Bell v. Board of County Com'rs of Jefferson County, 451 F.3d 1079, 1102 (10th Cir. 2006) ("In Buckhannon, the Supreme Court held that a party is a prevailing party for the purpose of awarding attorneys' fee under [42 U.S.C.]§ 1988 only if he has obtained a judgment on the merits, a consent decree, or some other settlement materially altering the legal relationship of the parties."); and Am. Disability Ass'n, Inc. v. Chmielarz, 289 F.3d 1315, 1319 (11th Cir. 2002) ("[T]he district court interpreted Buckhannon to stand for the proposition that a plaintiff could be a 'prevailing party' *only* if it achieved one of those two results. That reading of Buckhannon, however, is overly narrow.").

[26] 315 F.3d 990, 993 (8th Cir. 2003).

[27] Id. at 996 (citation omitted).

status if the party obtains either an enforceable judgment on the merits or a court-ordered consent decree. Since most circuits do not take such a narrow view of Buckhannon, our adoption of the Straus test will bring the Board's jurisprudence in line with the majority of the courts of appeals. The law judges and the Board, in applying this three-part test, will still be making a fact-based determination on a case-by-case basis as to whether a party prevailed. None of the circuits have established a bright-line rule for defining a prevailing party—each circuit examines the facts of the individual case to determine such factors as whether there is a change in the legal relationship between the parties; whether there is judicial relief granted; whether there is sufficient judicial imprimatur; and so forth, before finding prevailing party. For these reasons, we hereby adopt the Straus three-part test in our decision today.

3. *The Instant Case*

Turning to the case at hand, we concur with the law judge's ruling that applicant was the prevailing party under the Straus three-part test. The law judge provided a court-ordered change in the legal relationship of the parties when he dismissed the case *with prejudice.* To the extent the Administrator argues there was no court-ordered change in the legal relationship of the parties because the FAA voluntarily withdrew the complaint under 49 C.F.R. § 821.12(b), we reject this argument. The Administrator sought to have the law judge terminate the proceedings *without prejudice* so the Administrator would have an opportunity to continue the investigation and possibly "issue a new Order of Revocation in this matter."[28] In the Administrator's petition to the Board, the Administrator's counsel indicated the FAA intended to conduct further investigation stating, "it was decided, in an abundance of caution, not to proceed with the hearing

[28] See Answer to Respondent's Motion for an Order Terminating the Proceedings with Prejudice, dated September 24, 2010, at 2.

at this time to see whether further evidence could be uncovered that would further point to [a]pplicant's culpability or exoneration for this particular act." Pet. at 5. By entering an order dismissing the proceedings with prejudice, the law judge took the FAA's so-called voluntary act of withdrawing the complaint and indelibly marked it with his judicial imprimatur by dismissing the complaint with prejudice, effectively preventing the FAA from continuing its pursuit of charges against applicant. The law judge's order clearly was in favor of applicant.

Notwithstanding the law judge's ruling that the case was dismissed with prejudice, under the third prong of the Straus test this judicial pronouncement must be accompanied by judicial relief. As the law judge pointed out in his decision, applicant's case on the merits was an emergency proceeding. In emergency proceedings, the FAA's order revoking a certificate becomes effective immediately and remains in effect throughout the judicial review process by the law judge and, if applicable, this Board.[29] In this case, applicant surrendered his mechanic certificate for over a month while the case proceeded on the merits. When the law judge ordered dismissal of the case with prejudice, applicant received judicial relief—the FAA returned his revoked certificate to him and was precluded from bringing further action against the certificate as a result of these allegations. Once again, the Administrator contends the FAA, not the law judge, effectuated the return of applicant's certificate by voluntarily withdrawing the charges. However, by denying the Administrator's request to dismiss without prejudice, the law judge ensured the Administrator could not bring a new certificate action against applicant for these allegations. Under these circumstances, applicant clearly was the prevailing party.

[29] See 49 U.S.C. § 44709; 49 C.F.R. § 821.52.

B. *Substantial Justification*

Under the EAJA, we will not award certain attorney's fees and other specified costs if the government was substantially justified in pursuing its complaint.[30] The Supreme Court has defined the term "substantially justified" to mean the government must show its position is reasonable both in fact and law.[31] Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.[32]

We previously have recognized the EAJA's substantial justification test is less rigorous than the Administrator's burden of proof when arguing the merits of the underlying complaint.[33] In Federal Election Commission v. Rose,[34] the D.C. Circuit stated the merits phase of a case is separate and distinct from the EAJA phase. As such, we are compelled to engage in an independent evaluation of the circumstances leading to the Administrator's original complaint, and determine whether the Administrator was substantially justified in pursuing the case based on those circumstances.[35]

The Administrator argues the FAA was substantially justified in pursuing the charges against applicant. Furthermore, the Administrator alleges the law judge erred in only considering the fact the case was withdrawn, rather than reviewing the entire administrative

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[30] 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992).

[31] Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

[32] Catskill Airways, Inc., 4 NTSB 799, 800 (1983)(Congress intended EAJA awards to dissuade the government from pursuing weak or tenuous cases).

[33] U.S. Jet, supra note 29, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)).

[34] 806 F.2d 1081 (D.C. Cir. 1986).

[35] Id. at 1087.

record, in reaching the conclusion the Administrator was not substantially justified in bringing the case.

Both the United States Supreme Court in Pierce v. Underwood[36] and the D.C. Circuit in Kuhn v. Board of Governors of Federal Reserve System[37] have held that in EAJA cases it is appropriate to consider supplemental filings to the record in cases involving a voluntary dismissal or settlement since no evidence was presented at a hearing. The D.C. Circuit stated:

> To confine the inquiry to the pleadings when the matter is brought to a close by a voluntary dismissal would be to place the government at a disadvantage Congress could not have intended. … The "reasons for the settlement" must also be evaluated in assessing the strength or weakness of the government's position. Yet those reasons will rarely, if ever, appear in the record. There is of course the danger that the fee proceeding, if allowed to go beyond the pleadings, will turn into another major litigation. But the chances of that occurring are minimized when the agency permits the parties to supplement the record only by filing affidavits or documents relating to whether the charges were warranted. To bar consideration of such additional material would, in the words of *Underwood*, "not only distort the truth but penalize and thereby discourage useful settlements." The same may be said about voluntary dismissals.[38]

Likewise, the Board previously has held the reasonableness of the Administrator's position is determined by review of the entire administrative record, not only the evidence admitted at hearing.[39] Therefore, we will consider the entire administrative record, including the supplemental filings by both parties, in resolving this issue. We note, however, we will not consider the maintenance records and other evidence which the Administrator obtained *only after* dismissing the complaint against applicant. Since that evidence clearly was not considered or

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[36] 487 U.S. 552 (1988).

[37] 930 F.2d 39 (D.C. Cir. 1991).

[38] Id. at 43 (citations omitted).

[39] Application of Magruder, NTSB Order No. EA-5278 (2007).

contemplated by the Administrator when filing the complaint, it follows that evidence should not be considered at this stage of the proceedings to justify the Administrator's original pursuit of the complaint.

Under the particular facts of this case, we find the Administrator proceeded on an extremely weak and tenuous case—the very type of case which Congress intended to discourage by permitting recovery of fees under the EAJA. The record indicates this case was not substantially justified in fact. The Administrator had no evidence that applicant, or anyone else for that matter, improperly installed the cap assembly. As noted by applicant, the Administrator failed to interview any of the mechanics involved in this case to try to determine who may have installed it. While we have long held that all mechanics must be scrupulously accurate in recording maintenance,[40] in this case, we also must consider the fact that applicant was not the mechanic with IA; he was not the DOM; and he did not return this aircraft to service. Other mechanics had work to complete on this aircraft after applicant. At the same time, the Administrator completely ignored the self-serving and contradictory statements presented by Messrs. Woodruff and Bartley in response to their FAA letters of investigation in which both admit they did not conduct a proper annual inspection. Perhaps most telling is counsel for the Administrator's own comment on the state of the evidence, "[i]t was obvious that one of these four men—Applicant/Respondent, or Messrs. Woodruff, Perkovich, or Bartley, had reinstalled the cap assembly, but then failed to secure it properly; and that one of them (at least) was not providing accurate information to the FAA." Pet. at 5. While the burden on the Administrator for showing substantial justification is lower than that on the Administrator in proving the merits

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[40] Administrator v. Brauchler, NTSB Order No. EA-5594 at 11 (2011); Administrator v. Partington, NTSB Order No. EA-5453 at 9 (2009); Administrator v. Morse, NTSB Order No. EA-3766 (1992).

of the case, we find this sort of slip-shod charging and hearing preparation is the exact sort of government overreaching that Congress intended to prevent with the EAJA.

The Administrator further argues the merits of this case would have been decided solely on the credibility of witnesses and, therefore, the Administrator was per se substantially justified in bringing this case. The Board generally has held the Administrator is substantially justified in pursuing a complaint if key factual issues hinge on witness credibility. In Application of Keith, we stated, "[b]ecause resolution of the matter at issue rested so prominently on the law judge's determination of witness credibility, we do not find convincing applicant's argument that the Administrator pursued this case with no substantial justification."[41] However, unlike in Keith, Magruder, and Peterson, this case did not proceed to hearing. In a situation like this, where no hearing was held, we decline to defer to the contention of the Administrator that the case would have been decided solely on credibility. If the case was, as the Administrator contends, going to come down solely to credibility, it would seem the Administrator would have proceeded to hearing and let the law judge decide which witnesses were more credible. But the record in this case shows the Administrator had other serious problems with his evidence against applicant. The Administrator sought out additional maintenance records after dismissing the complaint, which indicates the Administrator had not fully investigated this case prior to issuing the complaint. Despite the Administrator's arguments to the contrary, the maintenance records do not establish which of the four mechanics in question installed the cap assembly.

Overall, we agree with the law judge's finding that the Administrator was not substantially justified in pursuing these charges. We note, neither party argues we should

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[41] NTSB Order No. EA-5223 at 8 (2006); see also Application of Magruder, NTSB Order No. EA-5278 at 7 (2007); Application of Peterson, NTSB Order No. EA-4490 at 6 (1996).

bificate our findings regarding whether the Administrator was substantially justified in pursuing both the 14 C.F.R. §§ 43.9 and 43.13 charges. Though applicant admitted he failed to make entries in the aircraft logbook, he also raised several defenses to the § 43.9 violation. Furthermore, the aircraft logbook is not in the administrative record before us, so we cannot review those entries, or lack thereof. Even if we were to find the Administrator was substantially justified in pursuing the § 43.9 charges, based upon the administrative record before us, we would find that portion of the litigation was completely subsumed in the litigation of the § 43.13 charges and award zero percent of the fees for the § 43.9 charges and 100 percent of the fees for the § 43.13 charges.

In reaching our decision that the Administrator was not substantially justified in pursuing the charges against applicant, we have carefully considered the entire administrative record including the supplemental filings by both parties. Based on all of this information, we conclude the Administrator was not substantially justified in pursuing any charges against applicant.

C. *EAJA Fees*

The law judge, upon reviewing the billable hours and expenses of applicant's counsel, found the claim reasonable. He permitted recovery of 148.8 hours of attorney time at a rate of $180.00 per hour along with $1,785.39 of permissible expenses, for a total award of $28,569.39.

The Administrator contends many of the entries on the receipts are greatly exaggerated, duplicative, and unnecessary. The Administrator further argues the fee amount awarded by the law judge should be reduced by at least 50 percent since the total amount of hours claimed by applicant was excessive. We reject the Administrator's arguments that the law judge erred in finding the EAJA application failed to include the necessary information required by 49 C.F.R. § 826.23. We previously have viewed the provisions of § 826.23 to require copies of invoices

and other specific documents to indicate the attorney's rate, the hours spent, and a description of how the person spent the time billed in defense of the case.[42] Here, applicant provided detailed invoices along with affidavits from counsel further describing the specific services performed. In an affidavit responding to the Administrator's arguments that the applicant's fees were exaggerated and duplicative, applicant's counsel provided sound, reasonable explanations for those contested fees.

Overall, we agree with the law judge's determination that applicant's submitted charges were reasonable for this case. The amount of time claimed by applicant's counsel is not excessive for this type of emergency case and subsequent EAJA application. The Administrator has failed to proffer a reason for us to overturn the law judge's decision or to reduce the fee awarded.

The law judge granted fees in the amount of $28,569.39. We affirm the law judge's decision. We note applicant submitted additional documentation for a supplemental award of fees for the time spent responding to this EAJA appeal by the Administrator. As a result of our decision in favor of applicant, we also order reimbursement of the requested additional 17.9 hours of time ($3,222.00) for defending against this appeal, for a total award of $31,791.39.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. The law judge's decision granting fees is affirmed; and

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[42] See Application of Glennon, NTSB Order No. EA-5552 at 18-19 (2010); see also, e.g., Application of Bosela, NTSB Order No. EA-5133 at 6-7 (2005); Application of Collings, NTSB Order No. EA-5007 at 2-3 (2002); Application of Thompson, NTSB Order No. EA-4353 at 3-4 (1995).

3. The Administrator shall provide fees and expenses in the amount of $31,791.39 to applicant.[43]

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

[43] We note the FAA address for sending award grants listed in 49 C.F.R. § 826.40 is incorrect. The FAA now pays these awards through electronic fund transfer. Therefore, we order counsel for the Administrator to timely contact applicant's counsel with the correct information for filing this claim to ensure payment within the 60-day timeframe established in § 826.40.

SERVED: March 8, 2011

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

Application of FRANK BORDELON for an award of attorney fees and related expenses under the Equal Access to Justice Act (EAJA).	Docket: 351-EAJA-SE-18931

SERVICE:

FOR APPLICANT:
C. EDWARD ADAMS, ESQ.
JOHN CALLAHAN, ESQ.
7512 STANICH LANE, SUITE TWO
GIG HARBOR, WA 98335
(CERTIFIED MAIL AND FAX)

FOR RESPONDENT:
DAVID F. SHAYNE, ESQ.
OFFICE OF REGIONAL COUNSEL
FEDERAL AVIATION ADMINISTRATION
1601 LIND AVENUE, S.W.
RENTON, WA 98057
(FAX)

AMENDED INITIAL DECISION AND ORDER GRANTING APPLICATION FOR ATTORNEY FEES AND EXPENSES

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, et. seq., and the National Transportation Safety Board Rules implementing the EAJA, 49 C.F.R., § 826.1 et. seq., hereafter referred to as the Board's Rules, this Applicant comes before the National Transportation Safety Board ("the Board") for an award of attorney fees and other expenses against the Federal Aviation Administration (FAA), an agency of the United States. The Application was filed by the Applicant's counsel and establishes that he fulfills the eligibility

requirements set out in the EAJA and § 826.4 of the Board's Rules. The Application also meets the procedural requirements of the EAJA and the Board's Rules.

Statement of the Case

On August 19, 2010, on an emergency basis, the Administrator revoked Applicant Bordelon's Mechanic Certificate with Airframe and Powerplant ratings. Applicant appealed the Order of Revocation and the matter was set for hearing on September 21, 2010. But, the day before the hearing, the Administrator withdrew the Order of Revocation. On September 21, 2010, Applicant filed a Motion for an Order Terminating the Proceedings with Prejudice. On September 27, 2010, the Administrator sent a letter to the ALJ withdrawing the Complaint. The undersigned issued an Order Terminating Proceeding with Prejudice on September 30, 2010. On October 13, 2010, Applicant filed an Application for an Award of Attorney Fees and Other Expenses Pursuant to the Equal Access to Justice Act (EAJA).

The Equal Access to Justice Act, 5 U.S.C. § 504 et. seq. as implemented by the Board in 49 C.F.R. Part 826, provides that "an eligible Party may receive an award when it prevails over the FAA, unless the Government Agency position in the proceeding was substantially justified --" 49 C.F.R. 826.1

The Prevailing Party Issue

The United States Circuit Court for the D.C. Circuit established a three-part test for determining whether a party has "prevailed": (1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief. *Turner and Coonan v. NTSB*, 608 F.3d 12, 15 (D.C. Cir. 2010) (quoting *District of Columbia v. Straus*, 590 F.3d 898, 901 (D.C. Cir.2010)).

In *Turner*, on March 13, 2008, the Administrator issued an order suspending Coonan's Airline Transport Pilot (ATP) certificate for 120 days, and Turner's ATP certificate for 30 days. *Application of Turner and Coonan*, Order No. EA-5467 (2009). On June 20, 2008, the Administrator filed a notice for withdrawal, and on June 24, 2008, the ALJ issued an order dismissing the case without prejudice. *Id.* Turner and Coonan filed a timely application for attorney's fees and expenses under the EAJA, which the Administrator contested. *Id.* The ALJ granted Turner and Coonan's request for fees and expenses, but on appeal the Board reversed the ALJ's decision. *Id.* Turner and Coonan appealed to the United States Court of Appeals, D.C. Circuit. The Circuit Court denied the petitioners' request for attorney's fees, stating that "[b]ecause the ALJ dismissed the cases without prejudice, there was nothing in this case analogous to judicial relief." *Turner*, 608 F.3d at 16 (citing *Straus*, 590 F.3d at 901). The court added that when the "[Administrator] withdrew its complaints, the pilots were no longer the subject of proceedings to suspend their [certificates]. For all practical purposes, the FAA had unilaterally ended the adversarial relationship between the parties, leaving them where they were before the complaint was filed."

But, the present case is distinguishable from *Turner*. In *Turner*, although the Administrator suspended the pilots' Airmen Certificates, the Administrator did not file an Emergency Order of Revocation. As a result, when Turner and Coonan appealed the Administrator's order, the suspension of their certificates was stayed pending appeal pursuant to 14 C.F.R. § 13.19.[1] Because the pilots were never forced to surrender their certificates, the pilots, when the Administrator withdrew his complaints, were left in the same position as they

[1] Section 13.19(d) states that "[i]f the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice."

were before the complaints were filed against them. In the present case, however, the Applicant's Mechanic Certificate was revoked immediately and for a period exceeding one month. Because the Administrator forced Bordelon to surrender his certificate immediately and for more than a month, there was a substantial change in the legal relationship between the parties.

The second part of the test, that the judgment must be in favor of the party seeking relief, is clearly met because the undersigned's termination of the proceedings with prejudice was "in favor" of Applicant.

The third element, that judicial pronouncement must be accompanied by judicial relief, is also met. In *Turner*, the court noted that there was "nothing in the case analogous to judicial relief" since "the ALJ dismissed the cases without prejudice." But, in the present case, the dismissal was with prejudice.

In the recent Board case of *Koch*, EA-5571 decided January 28, 2011, the Board upheld a dismissal with prejudice where the FAA withdrew its complaint the day prior to trial. That case, like *Turner* involved a suspension, not an immediate revocation of the certificate; and the Board held that dismissal with prejudice would be a "case specific inquiry." *Koch* at 7. Here the dismissal with prejudice was not appealed.

Where the FAA exercises the extraordinary power to revoke a certificate on an emergency basis and then, the day prior to trial, withdraws that emergency order, a dismissal with prejudice would seem to always be appropriate.

Here the Applicant is the prevailing party.

The Substantial Justification Issue

The Board has held that substantial justification requires "appropriate credibility judgments". *Martin,* EA-4280 (1994). "Preliminary to the credibility issue is the question of the reasonableness of the Administrator's investigation prior to filing the complaint, as this matter is directly relevant to whether the Administrator was substantially justified -- had a reasonable basis in truth -- in "bringing the action". *Peterson,* EA-4490 at 7.

The withdrawal of this Emergency Order of Revocation the day before trial did not allow for any appropriate credibility judgments and the only conclusion is that the Administrator was not substantially justified in revoking this certificate on an emergency basis.

Conclusion

Applicant was the prevailing party and the FAA was not substantially justified in revoking Applicant's certificate on an emergency basis.

The Award

Applicant's Counsels seek recovery for 148.8 hours of time, plus costs of $1,785.49, for a total award of $39,497.39. Although FAA Counsel has objected to some of these charges, a review of the hours and expenses claimed appear reasonable. Applicant's counsel is seeking a recovery based on his billing rate of $250.00 per hour. However, under 49 C.F.R. § 826.6 the maximum hourly rate under the CPI for the year 2010 is $180.00 per hour. The time set out in the Application is 148.8 hours times the CPI rate of $180.00 would total $26,784.00. That, plus the expenses of $1,785.39, would make the total award $28,569.39.

Order

The Applicant herein was the prevailing party and the Administrator was not substantially justified in revoking Applicant's certificate on an emergency basis. The hours and

expenses sought are reasonable, and therefore, Applicant is awarded the amount of $28,569.39 for his fees and expenses herein.

And it is SO ORDERED.

Entered and served this 8th day of March, 2011, at Arlington, TX.

William R. Mullins
Administrative Law Judge

APPEAL (EAJA INITIAL DECISION)

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it has been served (the service date appears on the first page of this decision). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rule 38 of its Rules Implementing the Equal Access to Justice Act (codified at 49 C.F.R. § 826.38) and Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.