

SERVED: July 29, 2009

NTSB Order No. EA-5467

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 27th day of July, 2009

APPLICATIONS OF)
MARK K. TURNER and)
STEPHEN J. COONAN)
For an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
Dockets 331-EAJA-SE-18212)
and 332-EAJA-SE-18213)

OPINION AND ORDER

The Administrator appeals from the Equal Access to Justice Act (EAJA)¹ initial decision of Chief Administrative Law Judge William E. Fowler, Jr., served on August 29, 2008.² The law

¹ Title 5 U.S.C. § 504; see also 49 C.F.R. part 826.

² A copy of the law judge's initial decision and order is attached.

judge granted applicants' consolidated EAJA application. The Administrator appeals that decision, and argues that the law judge erred in determining that applicants were entitled to attorney's fees and related costs as the "prevailing parties" under the EAJA. Applicants oppose the Administrator's arguments, and urge us to affirm the law judge's decision.³ We grant the Administrator's appeal.

On March 13, 2008, the Administrator issued an order suspending Applicant Coonan's Airline Transport Pilot (ATP) certificate for a period of 120 days, and Applicant Turner's ATP certificate for a period of 30 days. The Administrator's order alleged that respondents violated 14 C.F.R. §§ 91.7(a),⁴ 91.207(a)(2),⁵ 91.213(a),⁶ and 91.13(a),⁷ when they operated a

³ The law judge ordered an award of fees and costs in the amount of \$12,475.00. Applicants now request that we order an award of \$19,967.51, which is the total of the law judge's award plus the costs of responding to the Administrator's appeal. We also note that applicants filed a petition for reconsideration of the law judge's initial decision, in an attempt to argue that the law judge should have awarded a larger amount. The Board's General Counsel disposed of this petition by letter dated November 24, 2008, in which he stated that the Board's Rules of Practice do not allow for the filing of such petitions once a party has filed an appeal with the Board.

⁴ Section 91.7(a) prohibits operation of an aircraft unless the aircraft is in an airworthy condition.

⁵ Section 91.207(a)(2) prohibits operation of an aircraft that does not have "an approved personal type or an approved automatic type emergency locator transmitter that is in operable condition."

⁶ Section 91.213(a) provides that no person may take off an

Learjet-60 on May 4, 2007, and twice on May 10, 2007, while it was not in an airworthy condition.⁸

On March 28, 2008, the law judge issued an order consolidating applicants' cases and scheduling a hearing. On June 20, 2008, the Administrator filed a notice of withdrawal for the case, and on June 24, 2008, the law judge issued an order terminating the case. Applicants subsequently filed a timely application for attorney's fees and expenses under the EAJA, in which they sought attorney's fees and other expenses in the amount of \$13,243.12. The Administrator contested the application. The law judge issued a decision on August 29, 2008, in which he granted applicants' request for fees and expenses in the amount of \$12,475.00.

The EAJA permits an award of certain attorney's fees and other specified costs that a qualified⁹ prevailing party incurs,

(..continued)

aircraft with inoperative instruments or equipment installed, unless certain conditions are met.

⁷ 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.

⁸ On April 4, 2008, the Administrator issued an amended order, which charged applicants with operating the aircraft on May 5, 2007, rather than May 4, 2007, and alleged that an inspection of the aircraft's emergency locator transmitter occurred on May 8, 2007, rather than May 5, 2007.

⁹ When a party seeking fees 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 at the time of the initiation of the

unless the Government shows that it was substantially justified in pursuing its complaint.¹⁰ The Supreme Court has defined the term "substantially justified" to mean that the Government must show that its position is reasonable in fact and law.¹¹ Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.¹² The Administrator must also show that the FAA's pursuit of the case at each step of the proceedings was reasonable.¹³

We have previously stated that the issue of whether the party applying for fees under the EAJA is a "prevailing party" is a separate inquiry from the issue of whether the Administrator was substantially justified in pursuing a case against an applicant.¹⁴ Specifically, we have stated that,

(..continued)
adversary adjudication. 5 U.S.C. § 504(b)(1)(B).

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

¹¹ Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

¹² 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).

¹³ See Administrator v. Phillips, 7 NTSB 167, 168 (1990).

¹⁴ Application of Nicolai, NTSB Order No. EA-3951 (1993) (citing Fed. Election Comm'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), and Application of Pando, NTSB Order No. EA-2868 (1989)).

"[w]hether the government wins, loses or, as in this case, withdraws, is not determinative of whether the Administrator was substantially justified in pursuing the matter, as a different analysis is undertaken."¹⁵ Nicolai, supra, at 4.

Prior to reaching the issue of whether the Administrator was substantially justified in pursuing a case, we first must verify that the party seeking fees under the EAJA prevailed in the case below. On this issue, the law judge in this case stated that, "[w]ith the subsequent total withdrawal of all of the Administrator's charges against the applicants, it is clear that the applicants are the prevailing parties here." Initial Decision at 2. In support of this finding, the law judge quoted the following from Nat'l Coalition Against Misuse of Pesticides v. EPA, 828 F.2d 42, 44 (D.C. Cir. 1987): "the final result represents in a real sense, a disposition that furthers the applicants' interest." Initial Decision at 3. The law judge also stated that the Administrator's pursuit of the case was not substantially justified, as the Administrator "proceeded on a weak and tenuous basis with a flawed investigation bereft of any meaningful evidence against applicants." Id.

The Administrator now appeals the law judge's order on the

¹⁵ In Nicolai, the Administrator withdrew the complaint after a hearing on the record before the law judge and while his appeal was pending before the Board.

basis that applicants are not eligible for attorney's fees and costs under the EAJA because applicants are not prevailing parties. The Administrator's appeal brief argues that the law judge's ruling is contrary to Supreme Court precedent, because the Court held, in Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health, 532 U.S. 598 (2001), that a prevailing party is one who received an enforceable judgment on the merits of a case, or who obtained a court-ordered consent decree that resulted in a change in the legal relationship between the parties. Id. at 603–605. The Administrator's appeal brief further states that this analysis applies to the EAJA, because the Court stated, "[w]e have interpreted ... fee-shifting provisions consistently." Id. at 602 n.4 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)). The Administrator's brief argues that application of the Court's analysis in Buckhannon to this case indicates that applicants would not be prevailing parties for purposes of the EAJA, because the law judge did not issue a decision on the merits of the case, and the legal relationship between the parties did not change. The Administrator's brief states that the law judge's reliance on National Coalition, supra, was misplaced, as withdrawal of the charges against applicants did not further their interest.

Applicants contest each of the Administrator's assertions. Specifically, applicants state that the Administrator had

previously pursued a case in which the FAA sought a civil penalty against applicants' employer, The Peters Corporation, and that the Administrator withdrew the charges against Peters in exchange for an agreement that Peters would not pursue a claim under the EAJA. Applicants contend that the Administrator sought the same agreement with them, but that applicants did not agree, and the Administrator nevertheless withdrew the complaints against applicants. In addition, applicants request that we order a hearing for further argument on this case.¹⁶

With regard to the Administrator's analysis of case law interpreting the EAJA, applicants argue that the Administrator's analysis is flawed because the Administrator relied on inapplicable case law. In particular, applicants contend that the EAJA has two distinguishable parts: 5 U.S.C. § 504, which applies to administrative adjudications under the Administrative Procedure Act; and 28 U.S.C. § 2412(a), which applies to civil actions that the Federal Government pursues. Applicants' brief states that it is 5 U.S.C. § 504 that applies to cases in which the Administrator has attempted to take certificate action against a certificate holder. Accordingly, because Buckhannon addressed a case that failed to reach an actual hearing or trial

¹⁶ The issues have been fully briefed by the parties and we conclude that oral argument is not necessary. See 49 C.F.R. § 821.48.

under 28 U.S.C. § 2412, it is not controlling under the facts of this case.

Applicants also cite the legislative history of § 504, which provides that, in cases in which an agency has withdrawn a charge, courts should consider whether the agency was substantially justified in pursuing the case. H. Rep. 99-120, Part 1 at 14 (1985). Applicants further state that the Board's Rules of Practice, at 49 C.F.R. § 826.24(c)(4), imply that an applicant is a prevailing party when the Administrator voluntarily dismisses an action against the applicant and thus are consistent with the legislative history.¹⁷ Applicants state that this implication in the Board's Rules of Practice does not conflict with the Supreme Court's holding and dicta in Buckhannon, again because Buckhannon is not applicable to cases that come before the Safety Board under 5 U.S.C. § 504. In support of this assertion, applicants cite Mendenhall v. NTSB, 213 F.3d 464 (9th Cir. 2000), in which the court distinguished 5 U.S.C. § 504 from 28 U.S.C. § 2412 for the purpose of applying the statutory cap of § 504 on permissible attorney's fees.

Similarly, applicants rely on Melkonyan v. Sullivan, 501

¹⁷ Section 826.24 governs when an applicant may file an application under the EAJA. Subsection (c)(4) provides that, for purposes of applying § 826.24, final disposition means "issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration."

U.S. 89, 94 (1991), in which the Supreme Court distinguished the filing deadline provision in 28 U.S.C. § 2412(d)(1) from the deadline requirement in 5 U.S.C. § 504. Applicants also cite Application of Whittington, NTSB Order No. EA-5063 at 5 (2003), in which we found that the applicant had “prevailed” on all four charges that the Administrator alleged, even though the Administrator had withdrawn two of the charges.

Finally, applicants’ brief cites 5 U.S.C. § 504(a)(4) for the proposition that a party may recover attorney’s fees under the EAJA even when not a prevailing party, because § 504(a)(4) states that a party’s eligibility for fees is measured by a comparison between what the agency sought and the result that the party obtained.¹⁸ Applicants argue that, under this theory, they are entitled to recovery because the Administrator made a demand in excess of the outcome in this case.

In addition to receiving briefs from the Administrator and

¹⁸ Title 5 U.S.C. § 504(a)(4) provides, in part, as follows:

If, in an adversary adjudication arising from an agency action to enforce a party’s compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

applicants, we also received a brief from the Aircraft Owners and Pilots Association (AOPA) under 49 C.F.R. § 821.9(b).¹⁹ AOPA's brief reiterates applicants' legal arguments concerning the EAJA and states that, if we issue a decision in the Administrator's favor, then many aircraft owners and pilots will be forced to pay to defend themselves against unfair, unsupported cases that the Administrator will bring.

We first acknowledge that our case law concerning prevailing party status under the EAJA may need clarification. As stated above, we previously held in Whittington, supra, that an applicant had prevailed on all four charges that the Administrator alleged, even though the Administrator had withdrawn two of the charges prior to the administrative

¹⁹ Section 821.9(b) of our Rules of Practice provides that an amicus curiae brief, "may be filed, if accompanied by written consent of all the parties, or by leave of the General Counsel if, in his or her opinion, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding." The Administrator opposes the filing of the brief, on the basis that it is prejudicial because applicants' counsel is also counsel to AOPA, and this circumstance creates a situation in which applicants are able to file two briefs in their favor. Applicants replied to the Administrator's opposition, but we reject this reply as it is not permissible under our Rules of Practice. In any event, the Administrator's opposition does not articulate how AOPA's brief is prejudicial, given that the brief contains the same arguments as applicants' appeal brief. While we do not condone an attorney's functioning as counsel for a party and counsel for an entity that submits a brief of amicus curiae for our review, we nevertheless find that, in this case, our acceptance of the brief does not unduly broaden the matters at issue or prejudice either party. Therefore, we have considered the brief in accordance with § 821.9(b).

hearing.²⁰ However, more recently, in Application of Shaffer, NTSB Order No. EA-5323 (2007), we stated that we would not adopt the applicant's argument that he was the prevailing party when the Administrator withdrew portions of the complaint during the administrative hearing, but proceeded to prove the Administrator's case for revocation on the remaining charges. Id. at 3-4 n.5 (quoting Buckhannon, supra, and citing other Federal cases in agreement with Buckhannon). We have also stated that a reduction or waiver of sanction may not result in an award of fees under the EAJA, even though the applicants had received "a tangible benefit" from the outcome of the case. Application of Swafford, NTSB Order No. EA-4426 at 5 (1996); see also Application of Finnell, NTSB Order No. EA-4427 at 6-7 (1996). Moreover, in Application of Reinhold, NTSB Order No. EA-4354 at 6-7 (1995), we found that the applicant was not the prevailing party where he withdrew his appeal after the Administrator had issued a new certificate to him because he had obtained a new rating. In addition, in Application of Wieland, NTSB Order No. EA-4406 at 5 (1995), we used the standard of whether applicants had enjoyed a "substantially favorable outcome," when we held that the applicants had prevailed after

²⁰ It is significant to note, however, that the Board did not affirm the Administrator's remaining allegations that proceeded to a hearing in that case.

the Administrator withdrew two charges and significantly reduced the sanction.

Finally, and perhaps most importantly, we stated in Application of Barth, NTSB Order No. EA-3833 at 2-3 (1993), that when the Administrator withdrew the charges after the parties were represented by counsel, had conducted discovery, and held a settlement conference, the parties had not participated in an "adversary adjudication" and the applicant was not entitled to fees as the prevailing party. In Barth, we quoted our Rules of Practice concerning which proceedings are covered for purposes of the EAJA, and found that, "[a]bsent issuance of an order of suspension, an appeal to this Board, and a hearing on the record, applicant has not been a party to the required section 554 adjudication." Id. at 3 (emphasis added).²¹

We recognize that the amicus brief addresses policy considerations, particularly with regard to individuals who would undergo financial hardship if they needed to defend against a meritless case that the Administrator brought without opportunity to seek fee recovery under EAJA. However, AOPA's brief does not acknowledge the corresponding consequence that could result from the ruling they urge us to make. The

²¹ See also 49 C.F.R. § 826.3(b), which provides the Board with some discretion in determining what types of proceedings the Board will consider under the EAJA.

Administrator might in the future, following such a ruling by this Board, be disinclined to withdraw any case or charge where the matter would still need to be litigated at considerable time and expense as an EAJA case. Or, in addition, the Administrator might be inclined to persist if such withdrawal would increase the possibility of an award of fees and costs under the EAJA, because the Administrator's decision could be interpreted by the administrative law judge as an indication the Administrator was not substantially justified in pursuing the initial allegations, perhaps because the allegations were not substantially supported or justified by the evidence.

This Board need not resolve these potentially competing policy considerations. We construe the question as essentially a matter of purely legal interpretation. We remind both parties that the plain language of 5 U.S.C. § 504 must be the focus of our inquiry. Section 504(a)(1) of the statute provides as follows:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Further, the definitions section of the statute defines "adversary adjudication" as, "an adjudication under section 554 of this title in which the position of the United States is

represented by counsel or otherwise.” 5 U.S.C. § 504(b)(1)(C). Title 5 U.S.C. § 554(a), herein referenced, governs administrative adjudications, and applies “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” Courts have repeatedly emphasized the importance of a hearing on the merits of a case in determining whether an adversarial administrative adjudication under Title 5 has occurred.²² Moreover, we previously considered the fact that a hearing had not occurred in Barth, supra, at 4, when we analyzed the requirements of section 554 and concluded that the applicant was not the prevailing party because an adversarial adjudication had not occurred.

In light of the statute’s requirements, and after careful analysis of the case law, we believe that applicants’ argument that the Buckhannon standard is inapplicable to our cases is incorrect. The Supreme Court decided Buckhannon after the D.C. Circuit issued the National Coalition decision. Moreover, applicants’ reliance on Mendenhall and Melkonyan is misplaced, as both cases preceded the Supreme Court’s Buckhannon decision,

²² See Friends of Earth v. Reilly, 966 F.2d 690, 695–96 (D.C. Cir. 1992) (citing St. Louis Fuel and Supply Co. v. F.E.R.C., 890 F.2d 446 (D.C. Cir. 1989), and stating that, even though proceeding was similar to an adversarial adjudication, EAJA did not apply because the proceeding was not explicitly subject to 5 U.S.C. § 554).

and addressed only the application of 5 U.S.C. § 504 to the Board for purposes of the statutory cap on permissible fees and filing deadlines, respectively. In short, the courts did not address whether the common term "prevailing party" in both had a consistent and understood meaning. In contrast, the Supreme Court in Buckhannon squarely addressed in its finding the meaning of the term "prevailing party." Important for our purposes, even if implicit in its finding interpreting a common term used in similar statutory frameworks by Congress, the Court made itself clear. The Supreme Court expressly stated that fee-shifting statutes should be interpreted consistently, thereby indicating that the prevailing party standard for purposes of 5 U.S.C. § 504 is the same as it is for application of 28 U.S.C. § 2412. The Court also has previously noted, in Sullivan v. Hudson, 490 U.S. 877 (1989), that the statutes need not apply in a mutually exclusive manner.

Even were we to apply the National Coalition standard, we do not see how this would necessarily help applicants' case. In National Coalition, the D.C. Circuit declined to grant the applicants attorney's fees after finding that, under 28 U.S.C. § 2412(d)(1)(A), the applicants were not the prevailing parties because the final result did not "[represent] in a real sense a disposition that [furthered] their interest." National Coalition, supra, at 44 (quoting Grano v. Barry, 783 F.2d 1104,

1108 (D.C. Cir. 1986)). For this inquiry, the D.C. Circuit stated that courts must “focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or release from burden.” Id. (quoting Grano at 1108-1109). In National Coalition, the D.C. Circuit found that the applicants did not meet this standard because they had merely obtained a procedural victory when they obtained a judicial declaration from the D.C. Circuit indicating that the Environmental Protection Agency had incorrectly interpreted its statutory mandate. In this regard, the D.C. Circuit stated that its previous opinion “conferred no victory on [National Coalition] sufficient to justify an award of fees.” Id. In support of this finding, the court cited Hanrahan v. Hampton, 446 U.S. 754 (1980), in which the Supreme Court determined that obtaining reversal of district court judgment and a new trial did not constitute prevailing party status, and Brown v. Secretary of Health & Human Serv., 747 F.2d 878 (3d Cir. 1984), in which the Third Circuit found that a claimant who obtained a remand on grounds that the agency had issued a decision without substantial evidence did not confer prevailing party status.

Overall, regardless of whether National Coalition supplies the appropriate standard for determining whether applicants are prevailing parties, we do not find that applying National

Coalition would necessarily result in a conclusion that applicants are prevailing parties. In applying the standard that the result must further a party's interest "in a real sense," the D.C. Circuit apparently meant that the outcome must be favorable on the merits of the case, given that it excluded procedural victories. Here, the Administrator ceased to pursue the case at a point prior to the administrative hearing before the Board's law judge. While this action presumably ends the Administrator's efforts, there is no formal resolution of the charges as a matter of law, and the parties do not now enjoy a new legal status with regard to this case.

In any event, in applying the Buckhannon standard to this case, applicants do not satisfy the prevailing party standard, because they did not receive an enforceable judgment on the merits of this case, nor did they obtain a court-ordered consent decree that resulted in a change in the legal relationship between the parties. See Buckhannon, supra, at 604.²³ Here, applicants did not prevail on any portion of the merits of the case, as the Administrator withdrew the charges before the law judge could hold a hearing. In addition, the law judge did not

²³ The Court articulated this standard on the basis that enforceable judgments 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. (quoting Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 792-93 (1989)).

issue an order akin to a court-supervised consent decree; in his order dismissing this case, the law judge merely accepted the Administrator's withdrawal of the charges. The law judge did not dismiss the case with prejudice or in any way alter the relationship of the parties.²⁴ Despite applicants' belief that they have prevailed in a matter "litigated" against the Administrator, that perception is not the legal standard nor determination by which this matter is adjudged. We believe ourselves compelled to find that the Administrator's withdrawal of the complaint does not confer prevailing party status on applicants under the EAJA.

Furthermore, even if we agreed with applicants' position that the Buckhannon standard does not apply here, additional case law would compel us to conclude that an adversarial adjudication did not occur under the plain language of the statute. The Supreme Court has emphasized, and various courts of appeal have agreed, that the occurrence of a hearing under 5 U.S.C. § 554 is an important component of an adversarial adjudication. In Ardestani v. INS, 502 U.S. 129 (1991), the

²⁴ To the extent that the law judge's dismissal of the case may appear to be similar to a consent decree accepting a settlement agreement, we note that the Court in Buckhannon distinguished private settlements from judicially sanctioned settlement agreements. Id. at 604 n.7. Here the law judge's order merely reflected the Administrator's decision not to continue with the case.

Supreme Court held that a deportation hearing was not a "hearing under section 554," so the applicant was not permitted to pursue a fee award. Other circuit courts have also denied fees on the basis that other types of hearings, even though they are on-the-record adjudications, are not specifically adjudications under 5 U.S.C. § 554.²⁵ The Court further stated in Ardestani that:

Section 554 does not merely describe a type of agency proceeding; it also prescribes that certain procedures be followed in the adjudications that fall within its scope. We must assume that the EAJA's unqualified reference to a specific statutory provision mandating specific procedural protections is more than a general indication of the types of proceedings that the EAJA was intended to cover.

Ardestani, 502 U.S. at 136. The Court examined the legislative history of the EAJA, including the legislative history concerning amendments to the statute, and determined that the history was consistent with the Court's interpretation that the statute only applies to proceedings that fulfill the requirements of 5 U.S.C. § 554. Id. at 136-37.

²⁵ See, e.g., Five Points Road Joint Venture v. Johanns, 542 F.3d 1121 (7th Cir. 2008) (holding that an adversary adjudication under 5 U.S.C. § 554 had occurred because the agency had formulated an order after an evidentiary hearing occurred on the record, and that the statute requiring the hearing was sufficiently within the ambit of the Administrative Procedure Act); Friends of Earth, supra, at 690 (holding that Environmental Protection Agency's proceeding to revoke North Carolina's authorization to administer hazardous waste program was not an adversary adjudication within the meaning of EAJA even if withdrawal proceeding was functional equivalent of hearing governed by Administrative Procedure Act).

The Court also clearly stated that the focus on the occurrence of an evidentiary hearing under § 554 originates in the fact that the provisions and application of EAJA must be construed narrowly and in favor of the government, because an award of fees under EAJA qualifies as a waiver of sovereign immunity. In particular, the Court stated, "[t]he EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." Id. at 136. The Court cited prior Supreme Court opinions that set forth this interpretation.²⁶

While we acknowledge the policy arguments presented in this case, we are nevertheless compelled to find that an adversary adjudication did not occur in this case and thus respondents' right to recover fees and costs under EAJA, as defined by Congress, did not attach. We understand that applicants may view our holding as one that could promote abuse by the Administrator in the form of pursuing less than meritorious cases against airmen, and then withdrawing such charges on the eve of a hearing when pressed by a respondent. However, we are obligated to strictly construe the limited waiver of sovereign

²⁶ Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-686 (1983).

immunity contained in 5 U.S.C. § 504. Further, this Board must be cognizant of the guidance from the Supreme Court and other Federal appellate courts that have found that a hearing is a threshold factor in determining whether a party has standing to pursue an EAJA application. Given the lack of an adversary adjudication in this case, we cannot confer prevailing party status on applicants, and thus cannot find entitlement to fees and costs under these circumstances as a matter of law.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's decision, granting applicants' EAJA application, is reversed; and
3. Applicants' application for an award of attorney's fees and expenses is denied.

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order. SUMWALT, Member, did not concur, and submitted the following dissenting statement.

Member Robert L. Sumwalt III, Dissenting

In its opinion, the majority purports to uphold prior Supreme Court precedent in rejecting the applicants' request for attorney's fees under the Equal Access to Justice Act (EAJA), based upon the absence of an evidentiary hearing due to the Administrator's voluntary withdrawal of charges. In practical effect, however, the majority rejects the Congressional intent behind the EAJA, as well as the express language of the Board's own rules, as it posits an overbroad application of a single Court ruling never intended to possess such breadth. In so doing, the majority closes the door to relief not only on the

applicants before it, but quite possibly on hundreds - if not thousands - of similarly-situated applicants to come.

As the majority ably recites the statutory requirements for an EAJA claim, I will refrain from repeating them. I believe it useful, however, to briefly review the EAJA's requirement that an "adversary adjudication"²⁷ occur.

The term "adversary adjudication" is defined by 5 U.S.C. § 551(7) as the "agency process for the formulation of an order," and an "order" is further defined by 5 U.S.C. § 551(6) as the "whole or part of a final disposition. . . ." The Administrative Conference's 1981 issuance of model rules to guide federal agencies in implementing the EAJA encouraged those agencies to be explicit regarding which types of proceedings are clearly covered as an adversary adjudication: "Where it is clear that certain categories of proceedings are governed by [section 554], agencies should list the types of proceedings in their rules."²⁸ Later, in attempting to provide guidance regarding when a party may be deemed to have "prevailed" under a final disposition, and therefore be eligible to file an EAJA claim, the Administrative Conference stated, "If, for example, certain claims are finally dismissed or favorably settled while others go to hearing, a party may have prevailed with respect to the dismissed or settled claims, which will not ordinarily be subject to judicial review."²⁹ It then noted, "We have revised the provision to avoid any inadvertent exclusion of possible final dispositions; this is a complex area, however, and we recommend that agencies review the provision carefully to determine whether it accurately reflects their own practices."³⁰ The Administrative Conference, though, took the view that the reference to adjudications should be more inclusive than exclusive: "Exactly what proceedings are encompassed by this language has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its

²⁷ 5 U.S.C. § 504(a)(1) (2008).

²⁸ Administrative Conference of the United States, *Model Rules for Agency Implementation of the Equal Access to Justice Act*, 46 Fed. Reg. 32,900, at 32,901 (June 25, 1981).

²⁹ Id. at 32,908.

³⁰ Id.

ambit.”³¹

Although the Administrative Conference’s discussion is non-binding, it is instructive in that it demonstrates an intention for federal agencies to broadly interpret which proceedings would fall under the jurisdiction of the EAJA, and to expressly designate in their rules those proceedings that clearly do so.

Turning to the Board’s own adoption of its rules implementing the EAJA,³² the Board states: “An application may be filed whenever the applicant has prevailed in the proceeding. . . . If review or reconsideration is sought or taken of a decision to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. . . .”³³

The Board then clearly and unmistakably recites in Section 826.24(c) that a “voluntary dismissal” constitutes the “final resolution of a proceeding” upon which a prevailing party may initiate an EAJA claim. It is reasonable to argue that this language was intentional, and – given the nature of proceedings before the board – foresaw the need for EAJA claims arising out of voluntary dismissals by the FAA or other primary enforcement agency. Such is the case with the applicants before us.

The result advanced by the majority, however, would entirely abrogate the plain meaning of this language. Although a party against whom action is taken by the Administrator is given express permission by the Board’s rules to pursue an EAJA claim upon a voluntary dismissal of the action, the majority would argue that that very dismissal would act as a procedural bar to any EAJA claim. In the face of such inconsistency, I would argue that it is the majority’s interpretation, rather than the unambiguous language of the Board’s own rules, that must yield.

Justification for the majority’s viewpoint rests in large part upon its application of the U.S. Supreme Court’s holding in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001). In the Court’s own words, however, the case’s holding was an extremely narrow one: “The question presented here is whether this term

³¹ Id. at 32,901.

³² 49 C.F.R. §§ 826.1-826.40 (2008).

³³ 49 C.F.R. § 826.24(a) and (b).

['prevailing party'] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result *because the lawsuit brought about a voluntary change in the defendant's conduct.*"³⁴ Indeed, the sole basis upon which the case was heard was to resolve disagreement between federal circuits as to the availability of the so-called "catalyst theory" to EAJA claimants.³⁵ In rejecting this theory, the Court once again emphasized the limited scope of its decision: "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a *plaintiff* who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief."³⁶

Despite the narrow application of the Court's holding in Buckhannon regarding a plaintiff's tenuous EAJA claim, the majority would extrapolate the same analysis to the applicants in the case before us - applicants forced into a defensive posture to contest the suspension of their Airline Transport Pilot (ATP) certificates due solely to the actions of the Administrator. The applicants here did not initiate a cause of action against a governmental agency to challenge the legality of its actions; rather, they were given a choice to either acquiesce to a suspension of their ATP certificates, or appeal the action of the Administrator. The factual and legal underpinnings of the two cases are fundamentally different, yet the majority would subject them to the same analysis as to eligibility under the EAJA. I find no logic in doing so.

Further, in Buckhannon, the Court notes that it has held that attorneys' fees may be awarded in cases where a party has received a favorable judgment on the merits or a settlement agreement enforced through a consent decree.³⁷ It then states, "We think, however, the 'catalyst theory' falls on the other

³⁴ Buckhannon, 532 U.S. at 600 (emphasis added).

³⁵ Id. at 601-02. "Although most Courts of Appeals recognize the 'catalyst theory,' the Court of Appeals for the Fourth Circuit rejected it. . . . To resolve the disagreement amongst the Courts of Appeals, we granted certiorari. . . ."

³⁶ Id. at 606 (internal quotation marks and citation omitted in original) (emphasis added).

³⁷ Id. at 603-04.

side of the line from these *examples*.”³⁸ In using the word “examples,” the Court indicates that the two prior circumstances under which attorneys’ fees have been awarded under the EAJA – judgments on the merits, or settlement agreements enforced through a consent decree – do not themselves present the *sole* conditions under which such fees may be awarded. Yet, the majority falls prey to just such an assumption when it analyzes the procedural record and denies further EAJA consideration to the petitioners expressly using this yardstick from Buckhannon. In the absence of an enforceable judgment on the merits or a court-ordered consent decree, it finds, Buckhannon forbids prevailing party status. I would argue, respectfully, that the majority has first erred in applying Buckhannon’s holding to the applicants’ case before it, and then erred as well in its interpretation of the holding itself.

The majority quotes a prior Board EAJA decision for the principle that, “[w]hether the government wins, loses or, as in *this case, withdraws*, is not determinative of whether the Administrator was substantially justified in pursuing the matter, as a different analysis is undertaken.”³⁹ The majority’s opinion, however, accomplishes that very determinative result. By erecting a procedural bar to the recovery of attorney’s fees under the EAJA whenever the Administrator voluntarily withdraws its case prior to a hearing, no substantive analysis of the justification for the Administrator’s underlying actions will ever occur.

The majority also cites the Board’s prior decision in Application of Barth, NTSB Order No. EA-3833 (1993), as support for its rejection of the applicants’ status as prevailing parties, due to the absence of a hearing on the record. In that case, however, the Board stated: “The question before us is straightforward: may attorney fees and expenses incurred in connection with defense against a Notice of Proposed Certification Action (NOPCA) be recovered, when the Administrator withdraws the NOPCA and never issues any order of suspension?”⁴⁰ In the applicants’ case before us, orders of suspension were issued by the Administrator, thereby distinguishing it factually from Barth. Further, it bears

³⁸ Id. at 605 (emphasis added).

³⁹ Application of Nicolai, NTSB Order No. EA-3951, at 4 (1993) (emphasis added).

⁴⁰ Barth, at 1-2.

noting that in the case before us, the absence of a hearing on the record was due not to any choice on the part of the applicants, but rather to the Administrator's voluntary withdrawal of the action.⁴¹ The majority's reliance on Barth presents a Catch-22 of sorts for the applicants: they cannot prove their entitlement to attorneys' fees under the EAJA absent a hearing on the record; due to the unilateral withdrawal of the Administrator, however - the party solely responsible for instigating the underlying action - the applicants will never be granted such a hearing.

In dismissing the *amicus* brief submitted by the Aircraft Owners and Pilots Association, the majority frets that a decision in this case adverse to the Administrator might prompt fewer withdrawals in the future, for fear that lengthy and expensive EAJA suits might follow, or that any withdrawal might be interpreted by the administrative law judge as an indication of the absence of substantial justification for the underlying cause. Such hypotheticals turn the very intent of the EAJA on its head: it was concern for protection of the rights of the private citizen against unjustified government action - not concern for the convenience or expense of the federal government itself - from which the EAJA's enactment arose. Even upon a finding of prevailing party status, the interests of the Administrator are herein protected by proving a substantial justification for the action. In those cases in which the Administrator lacks such a justification, however, the Board should not provide an additional safe harbor from liability under the EAJA in the form of procedural sleight of hand.⁴²

Some would argue that the Administrator's withdrawal of the

⁴¹ The applicants additionally requested the opportunity to present oral arguments before the Board regarding the issues raised in this appeal. Pursuant to 49 C.F.R. § 821.48(e), however, the majority declined to hear oral arguments.

⁴² In this matter, the law judge found that the Administrator had "proceeded on a weak and tenuous basis with a flawed investigation bereft of any meaningful evidence against applicants. . . ." Initial Decision at 3. Though one might reasonably argue that this case presents a textbook justification for the protections of the EAJA, the majority would entirely avoid any analysis of whether the Administrator was substantially justified in its action, based solely upon procedural arguments.

charges against the applicants should be vindication enough of their claims. I sincerely doubt that the applicants, obligated to expend thousands of dollars and untold hours in defense of their pilot certificates and their reputations, would agree. Therefore, I believe that the law judge's decision in this case should be affirmed.

SERVED: August 29, 2008

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

APPLICATION OF

MARK K. TURNER
& STEVEN J. COONAN

For an award of attorneys fees
and related expenses under the
Equal Access to Justice Act

Docket No.: 331-EAJA-SE-18212
& 332-EAJA-SE-18213

INITIAL DECISION AND ORDER
GRANTING APPLICATION FOR ATTORNEY FEES AND EXPENSES

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CHIEF JUDGE WILLIAM E. FOWLER, JR.

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504 et seq.
and the National Transportation Safety Board's (NTSB) Rules Implementing the EAJA,
49 C.F.R. 826.1 et seq., (herein after referred to as the Board's EAJA Rules) the

applicants come before the Board for an award of attorney fees and other expenses in the aggregate amount of \$13,243.12 (thirteen thousand two hundred forty three dollars and twelve cents) against the Federal Aviation Administration (FAA), an agency of the United States. The applicants through counsel filed the application. The application and supporting documents filed by the applicants establish that they meet the eligibility requirements set out in the EAJA and Section 826.4 of the Board's Rules and it has been determined by the undersigned that the application is both timely filed and procedurally correct.

The Administrator in this case charged the applicants through orders of suspension with violation of 14 C.F.R. 33, 91.13(a), 91.207(a)(2), 91.7(a) and 91.213(a) operating an aircraft in an unairworthy condition.

On March 21, 2008, the Administrator filed a complaint against each of the applicants. The cases were consolidated and a hearing was scheduled for August 19, 2008. Prior to that date the Administrator withdrew the complaints against each of the applicants on June 20, 2008. With the subsequent total withdrawal of all of the Administrator's charges against the applicants, it is clear that the applicants are the prevailing parties here.

In response to the applicants' claims of being the prevailing parties herein, the Administrator claims that applicants did not prevail because all four charges against applicants were withdrawn before the hearing. To the contrary, the applicants did prevail

within the meaning of EAJA because “the final result represents in a real sense , a disposition that furthers the applicants’ interest.” *National Coalition Against Abuse of Pesticides v. EAA*, 828 F.3rd 42, 44 (D.C.Cir. 1987). Thus, applicants prevailed on all four withdrawn charges both as to law and fact.

It appears to the undersigned that the agency proceeded on a weak and tenuous basis with a flawed investigation bereft of any meaningful evidence against applicants, this highlights the lack of substantial justification not having a reasonable basis in both law and fact. Therefore applicants’ application for attorney fees and expenses must be granted.

Where the issue of fees and expenses is concerned Rule 6(a) of the Board’s Rules 49 C.F.R. Part 826 Subpart A sets the guidelines for determining reasonable fees and expenses. In making this determination, I have considered the extent and complexity of the factual and legal issues presented. Also the depth of the legal research as reflected by the pleadings and other documents filed in this case. I agree with the Administrator’s claim, as valid, that some of the claims for time charged by counsel for applicants are somewhat excessive and accordingly I have reduced by 4.8 hours the total time spent in compilation of the legal fees.

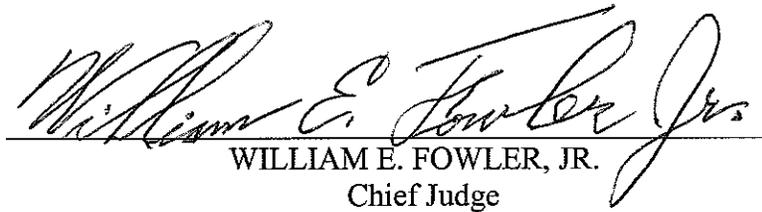
Having carefully reviewed the documentation filed by the applicants, it is concluded the legal fees, as reduced, are fair, just and equitable and are limited to the maximum of \$167.00 per hour for 51 total hours is reasonable and necessary for the

proper defense of the applicants. Thus a total award in this case of \$12,475.00 (twelve thousand four hundred seventy five dollars).

IT IS THEREFORE ORDERED THAT:

- (1) The consolidated application for an award of attorney fees and expenses, is GRANTED.
- 2) The Administrator shall in accordance with this Order pay the applicant the total sum of \$12,475.00 (twelve thousand four hundred seventy five dollars) within thirty (30) days of the date of the entry of this Order.

Entered and served this 29th day of August 2008, at Washington, DC.


WILLIAM E. FOWLER, JR.
Chief Judge