

SERVED: August 26, 2009

NTSB Order No. EA-5474

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 25th day of August, 2009

_____)
)
APPLICATION OF)
)
PATRICK SEAN RICE)
) Docket 340-EAJA-SE-17989
)
for an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
)
_____)

OPINION AND ORDER

Applicant appeals the February 3, 2009 order of Administrative Law Judge William R. Mullins, denying his Equal Access to Justice Act (EAJA) petition for fees and expenses totaling \$20,596.66.¹ We deny the appeal.

In the underlying proceeding on the merits, the law judge upheld the Administrator's amended order of suspension, affirming violations, as alleged, of 14 C.F.R. §§ 61.3(c), 91.13(a), and

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

91.151(b),² and modified the 90-day suspension of applicant's airline transport pilot certificate sought by the Administrator to a 75-day suspension.³ The original order of suspension included an allegation that applicant's performance also violated FAR § 91.9(a), but the Administrator amended the order

² Sections 61.3, 91.13, and 91.151, state, in relevant part:

Sec. 61.3 Requirement for certificates, ratings, and authorizations.

* * * * *

(c) *Medical certificate.* (1) Except as provided for in paragraph (c)(2) of this section, a person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft, under a certificate issued to that person under this part, unless that person has a current and appropriate medical certificate that has been issued under part 67 of this chapter, or other documentation acceptable to the Administrator, which is in that person's physical possession or readily accessible in the aircraft.

* * * * *

Sec. 91.13 Careless or reckless operation.

(a) ... No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

Sec. 91.151 Fuel requirements for flight in VFR conditions.

* * * * *

(b) No person may begin a flight in a rotorcraft under VFR conditions unless (considering wind and forecast weather conditions) there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed, to fly after that for at least 20 minutes.

³ The Administrator did not appeal the reduction in sanction.

approximately 80 days before the hearing to drop the FAR § 91.9(a) charge.⁴ The Administrator's charges stemmed from applicant's operation, as pilot-in-command, of a Bell 206 helicopter, N121RH, on a passenger-carrying flight that terminated in an urban neighborhood as a result of an unscheduled, hard landing due to fuel exhaustion. In upholding the charges at the hearing, the law judge did not find credible applicant's testimony that he fueled the helicopter with 52 gallons of fuel. The law judge also concluded that a preponderance of the evidence demonstrated there were no discrepancies with the helicopter's fuel system on the day of the accident, that the gauges were in proper working order, and that the accident occurred due to fuel exhaustion, which he found was due to applicant's failure to fill N121RH with enough fuel for the flight.⁵ The law judge modified sanction from the 90-day suspension sought by the Administrator with only the cursory explanation that, "since one of the four original regulatory violations was withdrawn, the undersigned finds that the appropriate sanction would be a 75-day suspension[.]"

⁴ Section 91.9, 14 C.F.R. Part 91, states, in relevant part:

Sec. 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

⁵ The law judge also found that applicant's second-class medical certificate was expired on the day of the accident flight.

On appeal of the merits proceedings, we affirmed the law judge's finding that applicant violated the FARs specified in the Administrator's complaint, but granted, in part, applicant's appeal as to sanction by further modifying the sanction to a 60-day suspension of applicant's ATP certificate. Administrator v. Rice, NTSB Order No. EA-5408 (2008). In evaluating applicant's arguments on appeal regarding sanction, we criticized the Administrator's failure to provide adequate explanation for the calculation of proposed sanction, and concluded, on that basis, that we did not owe the deference we normally afford the FAA on such matters. We reasoned:

[W]e note that the Administrator did not introduce the sanction guidance table into evidence at the hearing, or otherwise provide convincing evidence of the rationale for the choice of sanction. Moreover, we note that the range of sanction appears to be between 30 and 60 days for fuel exhaustion cases, where there are no aggravating circumstances such as an unfavorable compliance disposition or a history of prior violations. The law judge's sanction determination is owed no deference, for it provides no substantive explanation for how it was calculated. Finally, even on appeal, the Administrator provides no meaningful explanation of what range his sanction guidance table specifies for the violations at issue in this case, or, importantly, an explanation about how the facts of this case should be analyzed within the range of possible sanctions.

Rice, supra, at 9-10 (footnotes omitted). Thus, without a sanction determination that was owed deference, we engaged in a *sua sponte* evaluation of the record and our precedent, in order to address applicant's appellate arguments regarding sanction. In that context, we explained our decision:

In the only recent case we can discern that involved solely a violation of § 61.3(c), and from which we can draw a conclusion about a reasonable sanction for that

charge, in the absence of any meaningful guidance from the Administrator in this case, the sanction imposed was a 15-day suspension. Accordingly, without the benefit of the Administrator's application of his guidance to the specific facts of this case, we are constrained to reduce respondent's sanction to a 60-day suspension. Our determination as to sanction takes into account precedent in fuel exhaustion cases and expired medical certificate cases, and factors in the fact that multiple violations are present in the instant case. Moreover, we note that this sanction appears to fall within the range established in the Administrator's guidance.

Id. at 10-11 (footnotes omitted). We explained that we could not assess the validity of the sanction determination, and therefore may not defer to the Administrator's choice of sanction in future cases when the Administrator does not introduce into the record the relevant portions of the sanction guidance table or "present ... evidence or argument addressed to the validity of choice of sanction in the context of the specific facts of each case." Id. at note 11. It is important to note that we did not characterize the choice of sanction as arbitrary, as applicant argued on appeal, and we did not state that a 90-day suspension could not be appropriate, had the Administrator sought to justify that decision.

Applicant's amended EAJA application, submitted to the law judge, sought \$20,596.66 in fees and expenses.⁶ Applicant claims that he prevailed in two ways that should give rise to an EAJA

⁶ Applicant's EAJA application states, without any detailed explanation or justification for the specific fees claimed, that he "is entitle [sic] to at least two-thirds of [the adjusted hourly rate for all 164.8 hours of attorney fees incurred throughout the proceeding]." Applicant makes no apparent attempt to explain how the expenses claimed were associated with issues for which he argues an EAJA award is merited.

award.⁷ First, he claims he prevailed as to the FAR § 91.9(a) charge that was not included in the amended suspension order that was ultimately litigated. Second, he claims that he prevailed, for purposes of an EAJA analysis, on the issue of sanction because the Board reduced the 90-day suspension to 60 days.

The EAJA requires the government to pay certain attorney's fees and expenses of a prevailing party unless the government establishes that its position was substantially justified. 5 U.S.C. § 504(a)(1); see also 49 C.F.R. § 826.5.⁸ To meet this standard, the Administrator must show that the decision to bring and maintain the case was "reasonable in both fact and law, [that is,] the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory." Thomas v. Administrator, NTSB Order No. EA-4345 at 7 (1995) (citations omitted). Reasonableness in this context is determined by whether a reasonable person would be satisfied that the Administrator had substantial justification for proceeding with his case (Pierce v. Underwood, 497 U.S. 552, 565 (1988)), and on the basis of the "administrative record, as a whole" (Alphin v. National Transp. Safety Bd., 839 F.2d 817 (D.C. Cir. 1988)). The Administrator's failure to prevail on the merits in the original

⁷ Applicant has also requested leave to supplement the original application in the event we reverse the law judge's EAJA decision and grant an award of fees and expenses.

⁸ Our rules also specify that to be eligible for an EAJA award an applicant must not have a net worth exceeding \$2 million. Applicant appears to meet this threshold requirement. 49 C.F.R. § 826.4(b)(1).

proceeding is not dispositive. U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 (1993); Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

In his EAJA decision, the law judge concluded that applicant did not prevail, within the meaning of EAJA, as to the withdrawn FAR § 91.9(a) charge. The law judge also considered Board precedent and analyzed the normal range of sanctions contained in the public sanction guidance table, and concluded that the Administrator's pursuit of a 90-day suspension was reasonable in both law and fact.

In this EAJA appeal, applicant repeats the argument rejected by the law judge, that the withdrawn FAR § 91.9(a) charge and the reduction in sanction are, in the language of our rule, each a "discrete substantive portion of the proceeding" in which he prevailed and that he is, therefore, entitled to an award of fees and expenses. We disagree.

As to the withdrawn charge, applicant did not, in that regard, prevail on a significant and substantive portion of the proceeding. As we suggested in Application of Shaffer, albeit in *dicta*, as a general matter charges voluntarily withdrawn by the Administrator prior to a hearing will not give rise to an EAJA award.⁹ Shaffer, NTSB Order No. EA-5323 at 4 (2007).¹⁰ In

⁹ We expressly abandon our statement in Application of Whittington, NTSB Order No. EA-5063 at 5 (2003), suggesting that a withdrawn charge is, *a fortiori*, dispositive evidence that an applicant prevailed as to that withdrawn charge. This assertion in Whittington, which did not affect the resolution of that case, was incorrect in light of the relevant EAJA case law.

¹⁰ See also, Buckhannon Bd. & Care Home, Inc. v. West Virginia

short, none of the arguments applicant makes in support of his application demonstrate, "that the Administrator's voluntary withdrawal of portions of the complaint should, under the circumstances here, confer prevailing party status as to the abandoned charges." Shaffer, supra.¹¹

Turning to the reduction in sanction, NTSB precedent is clear that a sanction reduction will not, in and of itself, justify an EAJA award. Application of Swafford and Coleman, NTSB Order No. EA-4426 at 5 (1996). Moreover, even if we were to assume, *arguendo*, that applicant has achieved a rebuttable

(..continued)

Dep't of Health & Human Res., 532 U.S. 598, 605 (2001) (prevailing party is one who achieves a "judicially sanctioned change in the legal relationship of the parties"); Crabill v. Trans Union, 359 F.3d 662, 666 (7th Cir. 2001) ("[t]he significance of the [Supreme Court's] Buckhannon decision ... [i]s its insistence that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing ... party"); Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Dep't of Energy, 288 F.3d 452, 456-57 (D.C. Cir. 2002) ("to become eligible for an award of attorneys fees, [plaintiffs] must have been awarded some relief by a court, either in a judgment on the merits or in a court-ordered consent decree") (internal quotations and citations omitted); cf. American Disability Ass'n, Inc. v. Chmielarz, 289 F.3d 1315, 1320-21 (11th Cir. 2002) (party that achieves voluntary settlement can be deemed a prevailing party, consistent with Buckhannon, provided the court approves settlement agreement and expressly retains jurisdiction to enforce its terms, which is tantamount to a consent decree) (emphasis added).

¹¹ Applicant asserts that immediately after taking depositions of two FAA inspectors involved in the investigation of applicant's accident, his counsel asserted to the Administrator's counsel that he did not discern any justification for the § 91.9(a) charge in either FAA witnesses' testimony, and, thereafter, the Administrator's counsel stated her intent to amend the complaint. Although it does not form a basis for our decision, we note that EAJA is intended to deter the government from pursuing cases beyond the point where the facts render pursuit of the charges tenuous, and the Administrator's decision to abandon the charge when he did appears consistent with this policy.

presumption that he is entitled to an award, an assumption we do not reach in light of Swafford, supra, we find that the Administrator was reasonable in both fact and law in pursuing a 90-day suspension. In this regard, we adopt, as our own, the law judge's analysis. See Order Denying Application for an Award of Attorney Fees at 4-5. The EAJA is intended to deter the government from pursuing weak or tenuous cases, not to punish the government when agency counsel do not effectively litigate a discrete substantive issue that the government could potentially have prevailed on as a matter of fact and law.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied;
2. The law judge's decision is affirmed; and
3. Applicant's application for an award of attorney's fees and expenses is denied.

HERSMAN, Chairman, HART, Vice Chairman, and ROSENKER, HIGGINS, and SUMWALT, Members of the Board, concurred in the above opinion and order. Member SUMWALT submitted the following concurring statement.

Member Robert L. Sumwalt III, Concurring

In its opinion, the Board states, "[A]s a general matter charges voluntarily withdrawn by the Administrator prior to a hearing will not give rise to an EAJA award."¹² For the reasons set forth in my dissent in Applications of Turner and Coonan, NTSB Order No. EA-5467 (2009), I continue to respectfully disagree with this logic. While the Board rightly rejects the prior holding that, "a withdrawn charge is, *a fortiori*, dispositive evidence that an applicant prevailed as to that withdrawn

¹² See infra p. 7.

charge,"¹³ I would argue that the converse is also true: voluntary withdrawal of a charge by the Administrator - even prior to a hearing on its merits - should not automatically bar a determination that an applicant has prevailed on the charge so withdrawn.

In the case before us, however, I agree with the Board that the applicant did not prevail "on a significant and substantive portion of the proceeding."¹⁴ Therefore, I concur that the law judge's decision in this case should be affirmed.

¹³ See infra p. 7 at note 9 (rejecting a statement from Application of Whittington, NTSB Order No. EA-5063 at 5 (2003)).

¹⁴ See infra p. 8. The opinion omits a citation to 49 C.F.R. § 826.5(a) (2008), which states, "A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or *in a significant and discrete substantive portion of the proceeding. . . .*" (emphasis added).

SERVED FEB. 3, 2009

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

PETITION OF

Patrick Sean Rice

for Application for an Award of Attorney Fees
and Other Expenses Under the Equal Access
to Justice Act (EAJA).

EAJA Docket No.:
340-EAJA- SE-17989
JUDGE MULLINS

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ORDER DENYING APPLICATION
FOR AN AWARD OF ATTORNEY FEES

The Applicant has filed an Application dated 28 November 2008, for an Award of Attorney Fees and Other Expenses under the Equal Access to Justice Act (EAJA). The application relates to attorney fees and other expenses incurred by Petitioner's response to Federal Aviation Administration (FAA) Airman Certificate Action and Order of Suspension issued March 05, 2007 for violations of 14 C.F.R. § 61.3(c), § 91.13(a), and § 91.115(a) on August 9, 2006 when the Petitioner's helicopter ran out of fuel. For the reasons stated below, the application is denied.

The Equal Access to Justice Act Standards for Awards

The Equal Access to Justice Act Standards for Awards presented in 49 CFR

§826.5 provide:

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

The Petitioner claims it meets the requirements of 5 USC §504(a)(1) as a prevailing party. The Petitioner argues he is the prevailing party because the Administrator withdrew one of four allegations of regulatory violation, and because the National Transportation Safety Board ruled that a suspension of the Airman's Certificate for only 60 days would be more appropriate than the Administrator's sanction of 90 days. The Petitioner further argues that the Administrator's pursuit of the 90-day suspension was not substantially justified.

The Administrator filed a response to the Application for an Award of Attorney Fees and Other Expenses Under the Equal Access to Justice Act, maintaining that the Application should be denied because the Petitioner cannot be a prevailing party for a claim withdrawn more than 80 days prior to hearing, and that the FAA actions were substantially justified based upon the Department of Transportation, Federal Aviation Administration (FAA) Order 2150.3A, Compliance and Enforcement Program, Appendix 4 Enforcement Sanction Guidance Table, and based upon prior NTSB rulings on cases of helicopter fuel

exhaustion rulings.

Prevailing Party

The Administrative Law Judge ruled, and the National Transportation Safety Board affirmed, that the Petitioner was guilty of violating 14 C.F.R. § 61.3(c), § 91.13(a), and § 91.115(a) on August 9, 2006 when the Petitioner's helicopter ran out of fuel. The Petitioner was not the prevailing party in this litigation.

The Petitioner argues that he be viewed as a prevailing party regarding the Administrator's withdrawn initial claim for violation of 14 C.F.R. § 91.9(a). That withdrawn claim has not been established as a "significant and discrete substantive portion of the proceeding," required under 49 CFR § 826.5. The Administrator withdrew the initial additional § 91.9(a) claim more than 80 days before the hearing of the Petitioner's appeal by the Administrative Law Judge of the National Transportation Safety Board. The Petitioner cites the two depositions it took prior to the withdrawal of §91.9 as indication of its significant part of the larger case. The influence of that effort is minimized by the fact that of the 111 pages in those two depositions, 14 CFR § 91.9 is only mentioned once by counsel, and the Administrator's counsel immediately responds by informing Petitioner's attorney that the §91.9 claim was being withdrawn. (Baggett Deposition, pp. 67-68).

But, the Petitioner did unquestionably prevail in having the suspension period reduced from the original 90 days assigned by the Administrator to 60 days by the National Transportation Safety Board.

However, the NTSB has ruled that sanction reduction itself does not qualify per se as prevailing in an action. Nix v. Administrator, NTSB Order No. EA-4930 (2002). The determination as a prevailing petitioner due to reduction of sanctions in Gilfoil v.

Administrator, NTSB Order No. EA-3982 (1993), was qualified in Swafford and Coleman v. Administrator, NTSB Order No. EA-4426 (1996), at 4-5, as being limited to petitions where the sanction itself is the only significant portion being appealed.

Reasonable in Law and Fact

Under 49 CFR § 826.5, even if the Administrator does not prevail, so long as its position was substantially justified by being reasonable in law and fact, then award under the Equal Access to Justice Act should be denied. It is well established that investigators for the FAA regularly refer to and are guided by the Department of Transportation, Federal Aviation Administration Order 2150.3B (2150.3A prior to October 1, 2007), Compliance and Enforcement Program when determining sanctions for violations of FAA regulations. In that guidance, the recommended sanction for fuel mismanagement or exhaustion, § 91.151(a) violations, or for careless and reckless operation, § 91.13(a) violations, is a 30-150 day suspension of certificate. The recommended sanction for operation without a valid medical certificate, § 61.3(a) violations, is a 30-180 day suspension of certificate.

The National Transportation Safety Board reduced the sanction in this case based upon a review of awards in cases "without aggravated circumstances" appealed to the NTSB. Administrator v. Rice, NTSB Order No. EA-5408 (2008), at 10 (referencing Administrator v. Vogt, NTSB Order No. EA-4143 at n.17 (1994)). In evaluating the reasonableness in fact and law of the Administrators sanctions, the specific guidance provided in the Department of Transportation, Federal Aviation Administration Order 2150.3A, Compliance and Enforcement Program is instructive. The Enforcement Sanction Guidance Table General Guidelines, in Appendix 4 of Order 2150.3A, specifically state that the recommended suspension periods noted in the paragraph above are normal ranges for

a single violation of a particular regulation. The Guidelines also describe when sanctions beyond the range listed above should be applied to "deter future violations." (FAA Order 2150.3A, Appendix 4, at 2). Certificate actions should consider the totality of circumstances. Aggravating factors that would validate sanctions beyond the normal range include: violation of more than one regulation (this can justify a sanction beyond the sum of individual violations involved), the degree of hazard created by the violation, the level of the violator's experience, whether the activity was commercial, and factors listed in FAA Orders 1000.9D and 2150.3. (FAA Order 2150.3A, Appendix 4, at 2). Paragraph 206 of the Guidelines states that while "sanctions should be as uniform as possible," what is of "paramount importance is the requirement that the sanction selected in each case be sufficient to serve as a deterrent." (FAA Order 2150.3A, at 18).

In the present case, the hazard created by fuel starvation over a populated area, by an experienced law enforcement pilot, working in commercial operations, and being found guilty of violating three regulations, are aggravating factors that could justify sanctions outside the normal range. Looking at the normal ranges of sanctions presented in FAA Order 2150.3A Appendix 4, the sum total for each of the three violations the Petitioner was found guilty of could total 330 days. In light of such considerations, the Administrator's pursuing a sanction of 90 days is reasonable in law and fact.

Conclusion

The facts of this case do not make the Petitioner eligible as a prevailing party under the Equal Access to Justice Act. Even assuming the Petitioner could be found to be a prevailing party under some part of the withdrawn claim or reduced sanctions, under the Department of Transportation's Order 2150.3A (now 2150.3B), the Administrator's position

was reasonable in law and fact, and substantially justified.

Therefore, the Applicant's Application for an Award of Attorney Fees is denied.

And it is **SO ORDERED**.

ENTERED this 3d day of February 2009 at Arlington, TX.

A handwritten signature in black ink, appearing to read 'W R Mullins', written over a horizontal line.

WILLIAM R. MULLINS
ADMINISTRATIVE JUDGE