

SERVED: September 19, 2012

NTSB Order No. EA-5636

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 17th of September, 2012

APPLICATION OF)
)
)
CLIFFORD S. KAMM)
)
)
For an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
)
_____)

Docket 358-EAJA-SE-19099

OPINION AND ORDER

1. Background

Applicant has appealed from the Equal Access to Justice Act (EAJA) written initial decision and order of Chief Administrative Law Judge Alfonso J. Montano, served on March 16, 2012.¹ By that decision and order, the law judge denied applicant's EAJA² application for an

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

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

award of \$15,565.74 in attorney's fees and expenses, based on a finding the Administrator was substantially justified in charging applicant with violations of 14 C.F.R. §§ 91.155(a)³ and 91.13(a).⁴ Specifically, the Administrator alleged applicant violated §§ 91.155(a) and 91.13(a) by operating a passenger-carrying flight under visual flight rules (VFR) through clouds in Alaska. We deny applicant's appeal.

A. Facts

Applicant, who holds airline transport pilot (ATP) and private pilot certificates, owns Seawind Aviation in Ketchikan, Alaska. On July 14, 2010, applicant operated a sight-seeing tour in a deHavilland Model DHC-2 seaplane with six passengers, two of whom were FAA aviation safety inspectors conducting unannounced surveillance. In operating the flight under VFR, applicant was required to remain clear of the clouds.

During the flight, the FAA inspectors, Martine Sawtelle and Danny Billman, from the Anchorage Flight Standards District Office (FSDO), believed applicant flew through several small clouds near Misty Fjords National Monument. The FAA inspectors documented

³ Section 91.155(a) prohibits any person from operating an aircraft under visual flight rules when the flight visibility is less, or at a distance from clouds that is less, than the prescribed distance for the corresponding altitude and class of airspace in a specific table included in the regulation. With regard to Class G airspace, which is the category relevant to the flight at issue, the table provides as follows:

Airspace	Flight visibility	Distance from clouds
Class G: 1,200 feet or less above the surface (regardless of [mean sea level] MSL altitude) Day, except as provided in § 91.155(b)	1 statute mile.	Clear of clouds.

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

applicant's conduct by taking photographs during the flight and writing statements approximately two weeks after the flight. Inspector Sawtelle observed the clouds through the window on the left side of the aircraft, but not through the windshield. Inspector Billman observed applicant flying the aircraft through the clouds, and was alarmed, stating, "when we entered into the cloud it [sic] was no visibility, no terrain that I could see anywhere around the aircraft from my seat and I was alarmed. My heart rate went up and I know [Inspector Sawtelle] was shocked as well. We talked about it; it scared us." Tr. 142. The inspectors' written statements indicated the aircraft flew through the clouds after leaving Rudyerd Bay; however, Inspector Sawtelle later testified the entry into the clouds occurred prior to the mid-flight stop at Rudyerd Bay. Exh. R-172; tr. 48.

The four tourist passengers did not recall applicant flying the aircraft through clouds during the flight. The passenger who sat in the copilot seat recorded the flight with a video camera, but explained the recording contained gaps. Tr. 175-77.

On May 10, 2011, the Administrator issued an order suspending applicant's certificates for a period of 120 days, based on the alleged violations of §§ 91.155(a) and 91.13(a). Applicant appealed the order. The case proceeded to a hearing before the law judge on October 25 and 26, 2011.

B. Law Judge's Oral Initial Decision

At the conclusion of the hearing, the law judge delivered an oral initial decision, in which he determined the Administrator did not prove the charges in the complaint. The law judge stated the video and photographic evidence failed to prove the Administrator's case, because none of the evidence showed the aircraft proceeding through clouds. In addition, the law judge noted all four of the tourist passengers testified the aircraft did not fly through clouds. The law

judge carefully analyzed the evidence, and found the inspectors' testimony less reliable than the other passengers' testimony. The law judge based this determination on inconsistencies between the inspectors' written statements, drafted approximately two weeks following the flight at issue, and their testimony at the hearing. The law judge further stated the two inspectors' testimony was not corroborative:

Inspector Billman does not corroborate Inspector Sawtelle's testimony that the left wing disappeared into clouds for a matter of moments. However, in stark contrast, Inspector Billman testified that the aircraft flew through small clouds approximately eight times during the flight. Inspector Sawtelle did not corroborate his testimony on this point and she only testified about two specific instances of flying into the clouds.

Initial Decision at 244-45. As a result, the law judge held the Administrator failed to prove the charges alleged in the complaint.

C. Law Judge's Written Decision and Order on the EAJA Application

Following the law judge's decision, applicant submitted a timely application for attorney's fees and expenses under the EAJA. The law judge issued a written order denying fees, finding the Administrator was substantially justified in pursuing the case. The law judge summarized his decision on the merits of the case, noting his decision was based primarily on credibility findings, wherein he concluded the inspectors' testimony was less credible than the other passengers' testimony. The law judge rejected applicant's argument that the Administrator must award fees because it was error to pursue the case at all; in this regard, the law judge stated a hearing was necessary to assess the reliability and credibility of the inspectors' testimony. The law judge found the case not analogous to Application of Scott, in which the Board stated, "[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows or should know that his case is not reasonable in fact or law, or be liable for

EAJA fees for any further expenses applicant incurs.”⁵ Therefore, the law judge denied applicant’s EAJA application.

D. Issues on Appeal

Applicant appeals the law judge’s order denying fees and raises two issues. First, applicant contends the law judge erred in finding the Administrator’s pursuit of the underlying case was reasonable. Second, applicant argues the Administrator should have known the inspectors’ recollections of the flight were inconsistent, and therefore should have abandoned the case before the hearing.

2. Decision

The Board has never expressly adopted a standard of review of a law judge’s decision under the EAJA. Consistent with the standard of review applicable to cases on the merits, in which we conduct a *de novo* review, we will examine a law judge’s determinations concerning EAJA applications *de novo*.⁶ *De novo* review is consistent with the EAJA, 5 U.S.C. § 504(a)(3), which states, “[t]he decision of the *agency* on the application for fees and other expenses *shall be the final* administrative decision under this section.” [emphasis added].⁷

⁵ NTSB Order No. EA-4274 at 5 (1994).

⁶ The sole Court of Appeals to consider this issue ruled that agencies must employ a *de novo* review of an administrative law judge’s decision on fees. Lion Uniform, Inc. v. NLRB, 905 F.2d 120, 123 (6th Cir.), *cert. denied*, 498 U.S. 992 (1990). See also, Becker v. Sullivan, 1991 WL 107857 (D. Md. June 12, 1991) and Huang v. Attorney General of the U.S., 620 F.3d 372, 387 (3d Cir. 2010) (both citing Lion Uniform, Inc.)

⁷ See Smith v. Nat’l Transp. Safety Bd., 992 F.2d 849, 851-52 (8th Cir. 1993) (“Whether the agency’s position was substantially justified is determined by examining the administrative record as a whole. [5 U.S.C. § 504(a)(1)] The decision of the Board, *and not the ALJ*, is the final agency decision subject to our review, *id.* § 504(a)(3)”) [emphasis added].

A. *Substantial Justification*

1. *Reasonable in fact and law*

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.⁸ The Supreme Court has defined the term "substantially justified" to mean the government must show its position is reasonable both in fact and law.⁹ Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.¹⁰

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.¹¹ In Federal Election Commission v. Rose,¹² 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.¹³

⁸ 5 U.S.C. § 504(a)(1); Application of Bordelon, NTSB Order No. EA-5601 (2011); see also Application of Smith, NTSB Order No. EA-3648 at 2 (1992). We note the parties do not dispute that applicant prevailed in the underlying case, or that applicant has established he meets the eligibility requirements set forth in our Rules of Practice.

⁹ Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993).

¹⁰ Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (Congress intended EAJA awards to dissuade the government from pursuing weak or tenuous cases).

¹¹ U.S. Jet, supra note 9, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)).

¹² 806 F.2d 1081 (D.C. Cir. 1986).

¹³ Id. at 1087.

2. Substantial justification and relevance of credibility findings from the merits case

Applicant argues the law judge erred in finding the Administrator was substantially justified in bringing this case. We disagree. This case turned largely on witness credibility. The Board has held the Administrator is substantially justified in pursuing a complaint if key factual issues hinge on witness credibility. In Application of Keith, the Board 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.”¹⁴ The Administrator cannot predict with certainty which witnesses the law judge will find most credible.¹⁵ In this regard, the Board stated in Petersen, “[s]ubstantial justification for the FAA’s position cannot be found lacking simply because the law judge discredited the testimony of a particular witness.”¹⁶

Prior to the hearing, the Administrator had little cause to doubt the credibility of the two FAA aviation safety inspectors, each of whom had considerable aviation experience.¹⁷ The

¹⁴ 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).

¹⁵ See also Application of Caruso, NTSB Order No. EA-4615 at 9 (1994); Application of Conahan, NTSB Order No. EA-4276 (1994); Application of Martin, NTSB Order No. EA-4280 (1994).

¹⁶ Peterson, supra note 14 at 7.

¹⁷ Inspector Sawtelle holds private pilot, flight instructor, commercial, and airline transport pilot (ATP) certificates. Tr. 36. She testified she has single engine (seaplane) and multiengine privileges accompanying her commercial certificate, and she obtained her ATP certificate in a multiengine land aircraft. Tr. 36-37. Inspector Sawtelle joined the Anchorage Flight Standards District Office (FSDO) as an aviation safety inspector in September 2007. Inspector Billman holds a mechanic certificate with airframe and powerplant, as well as an inspection authorization. Tr. 106. With regard to pilot certificates, he stated, “I’m also a commercial pilot, instrument, multiengine land and sea,” and has “a little over 23,000 hours” Tr. 106. Inspector Billman had been employed at the FAA over 15 years at the time of the hearing. Tr. 107.

inspectors' written statements were generally consistent with their deposition testimony—all alleging the aircraft flew through clouds. Inspector Sawtelle's photographs showed an overcast sky with numerous clouds. Exh. A-2. Likewise, the passenger's video recording also showed numerous clouds. Exh. A-3. Only at the hearing did the inconsistencies in the FAA inspectors' testimony appear which caused the law judge to question their credibility. In his oral initial decision, the law judge noted,

There being no photographic or video evidence of a violation, the only evidence that I have in this case is the testimony of the witnesses and I have to use that testimony to determine if the Administrator has established a violation of the Federal Aviation Regulation. I must weigh the reliability and credibility of the individual who's [sic] testified under oath in this case.¹⁸

In reaching his decision on the merits, the law judge specifically found the FAA inspectors' testimony was not corroborative and was less reliable than the tourist passengers' testimony.¹⁹ Because we find this case hinged on the law judge's credibility findings, we find it was reasonable for the Administrator to pursue the case against applicant.

B. Obligation to Discontinue Pursuit of the Charges

On appeal, applicant also alleges the Administrator decided to pursue the case without conducting "an independent review of the evidence," which should have caused the Administrator to "discontinue [the Administrator's] prosecution when he knew, or should have known, that the case was not reasonable in fact."²⁰ In this regard, Applicant argues the Board's decision in Application of Scott²¹ is controlling in his case.

¹⁸ Initial Decision at 241.

¹⁹ *Id.* at 233, 235.

²⁰ Appeal Br. at 2.

²¹ NTSB Order No. EA-4274 (1994).

1. *Application of Scott*

In Scott, the Board held the Administrator should abandon the investigation of a case when he knows or should know the case is neither reasonable in fact nor law; otherwise, the Administrator will be liable for fees and expenses under the EAJA. In the merits portion of that case, the Administrator charged the applicant with landing a charter DC-8 on behalf of Hawaiian Air in an overweight condition when, only 200 miles from where the aircraft departed in Honolulu, air traffic control (ATC), at the request of Hawaiian Air's dispatch, ordered the applicant to return immediately to Honolulu. After initiating the turn-around, the applicant contacted ATC for further details, but was unable to obtain any more information. The applicant and his crew analyzed the implications of an overweight landing vis-a-vis fuel dumping, and chose to land overweight. After landing, the applicant complied with all required reporting of the incident, and argued the existence of an emergency justified his conduct. The Board ultimately dismissed the Administrator's complaint against the applicant.

When the applicant submitted a petition for attorney's fees under the EAJA, the Board granted the petition, finding the Administrator was obligated to investigate the applicant's claim that an emergency justified his overweight landing. Specifically, the Board determined the Administrator knew of the applicant's emergency defense, and the outright rejection of the defense, in the absence of investigation or meaningful consideration of it, was unreasonable.²² The Board stated, "[t]he Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable. We categorically reject the suggestion that the Administrator had no such duty."²³

²² Id. at 4 n.5.

²³ Id. at 5.

2. *The case at hand*

The facts and analysis in Scott are distinguishable from the case *sub judice*. Here, applicant simply argued he did not fly through the clouds rather than raise an affirmative defense—such as the emergency in Scott. The Administrator investigated the case by reviewing the physical evidence and interviewing the witnesses, including the four tourist passengers.²⁴ After conducting this investigation, the Administrator decided to pursue the case against applicant. As a result, the Administrator's actions did not disregard or fail to give meaningful consideration to applicant's defense. Given the evidence before the Administrator, consisting of photographs and the first-hand observations of experienced FAA inspectors, we find the Administrator's pursuit of the case was reasonable.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and
2. The law judge's decision denying fees is affirmed.

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

²⁴ Applicant's attorney refused to provide contact information for the tourist passengers or allow FAA staff to interview them unless applicant's attorney was present. Reply Br. at 4. Therefore, the interviews occurred almost 10 months after the flight.

Served: March 16, 2012

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

Application of

CLIFFORD S. KAMM

Docket 358-EAJA-SE-19099

for an award fees and expenses under
the Equal Access to Justice Act.

**WRITTEN INITIAL DECISION AND ORDER DENYING
APPLICATION FOR AWARD OF ATTORNEY FEES AND EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Served: Timothy E. Miller, Esq.
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Alfonso J. Montano, Acting Chief Administrative Law Judge: This is a proceeding brought under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the Board's Rules Implementing that Act ("EAJA Rules," codified at 49 C.F.R. Part 826). On November 30, 2011, the Applicant filed an "Application for Attorney Fees Under the Equal Access to Justice Act" (herein "Application"), seeking an award of attorney fees, costs and expenses in the amount of \$15,565.74 against the Administrator of the Federal Aviation Administration ("FAA"). The Administrator subsequently filed an Answer to that Application on December 30, 2011, and the Applicant filed a Reply to the Administrator's Answer on January 13, 2012.

The Application and supporting documents filed by the Applicant establish that he meets the eligibility requirements set out in the EAJA and the Board's EAJA Rules, and the Application is both timely-filed and procedurally correct.

I. The Underlying Proceeding

The pertinent facts in the underlying proceeding are that, on May 10, 2011, the Administrator issued an Order of Suspension, alleging that the Applicant failed to remain clear of clouds during a flight under visual flight rules ("VFR") on a flight he conducted on July 14, 2010. The Administrator cited the Applicant with violating Sections 91.115(a) and 91.13(a) and sought to suspend the Applicant's Airline Transport Pilot Certificate for a period of 120 days. On May 19, 2010, the Applicant filed an appeal. The case proceeded to hearing in Ketchikan, Alaska on October 25 and 26, 2011.

At the hearing, the Administrator presented the testimony of Aviation Inspectors Martine Sawtelle and Danny Billman. The Inspectors were described as specialists in the Technical Analysis Branch of the FAA's Flight Standards Division. Both Aviation Inspectors are instrument rated pilots with substantial experience in flying in mountainous terrain. Inspectors Sawtelle and Billman testified that they were assigned to conduct unannounced surveillance of air tour operations in Southeast Alaska. As part of that assignment, they took a "flight seeing" tour on Seawind Aviation, the Applicant's business operation. Each Inspector provided testimony as to what they saw during the subject flight and provided their individual versions as to when the aircraft was alleged to have flown through clouds. Inspector Sawtelle testified that she witnessed part of the aircraft's left wing tip fly through clouds and then later in the flight witnessed the aircraft flying in the clouds for up to ten seconds. Inspector Billman testified that he observed the aircraft flying through small clouds a least eight times before seeing it fly in the clouds for approximately twelve-to-fifteen seconds.

The Applicant testified on his own behalf and also presented the telephonic testimony of the four passengers that were on the flight at issue. The Applicant testified that he knew the Inspectors were on board the aircraft, as his wife informed him of that fact. He testified that his wife had asked Inspector Sawtelle if she was with the FAA when Inspector Sawtelle made the reservation. Inspector Sawtelle testified that she responded to that inquiry by saying that she and Inspector Billman were on vacation. The Applicant maintained that he did not fly through clouds during the flight in issues and surely would not have flown through clouds knowing that there were two FAA Inspectors on board.

All of the Applicant's passenger-witnesses – Bill Spruill, his brother Steve Spruill and their wives, Paula and Diane Spruill, testified via telephone due to the fact that they lived in Georgia. These witnesses testified from different geographic locations within that State, and they all testified that the Applicant's aircraft did not fly through clouds. Steve Spruill videotaped the majority of the flight, but testified that there were gaps in

the recording, which, he explained, were due to his operator error. He also testified that it was his first flight in a small aircraft, and he remembered flying through rain, which concerned him, but they did not fly through clouds. Tr. 181. Each of these passenger-witnesses indicated that they had been contacted by the Applicant's wife and were asked if they remembered flying through clouds during the flight. The Spruills each testified that they had been contacted by the Applicant's attorney, who asked if they were willing to speak to the FAA and testify at a hearing if necessary.

At the conclusion of the hearing, I issued an Oral Initial Decision ("OID"), in which I found that the Administrator had not proven, by a preponderance of probative, reliable and credible evidence, that the Applicant had committed the FAR violations alleged, and, on that basis, reversed the Administrator's Order of Suspension. The Administrator did not appeal the OID.

II. Analysis of the Applicant's EAJA Claim

The EAJA, 5 U.S.C. § 504, *et seq.*, requires the Government to pay to the prevailing party certain attorney fees and costs unless the Government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). The Board has held that, to be a prevailing party in an EAJA proceeding, an applicant need not have prevailed on every issue in the underlying matter; rather, it need only be shown that the applicant prevailed on "a significant and discrete substantive portion of the proceeding." *Application of Swafford and Coleman*, NTSB Order EA-4426 at 2 (1996), citing EAJA Rule 5(a) (codified at 49 C.F.R. § 826.5(a)). Once that burden has been met, the Administrator's position in the underlying matter must be shown to have been substantially justified in order to avoid an award. *Application of Wendler*, 4 NTSB 718, 720 (1983).

For the Administrator's position to be substantially justified, it must have been reasonable both in fact and in law – *i.e.*, 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. *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984). Reasonableness in fact and law should be judged as a whole, including whether "there was sufficient reliable evidence initially to prosecute the matter," and at each succeeding step of the proceeding. *Application of U.S. Jet, Inc.*, *supra*, at 2; *Application of Philips*, 7 NTSB 167, 168 (1990). But the Board has also made it clear that the substantial justification test is less demanding than the Administrator's burden of proof in the underlying proceeding, and it is not whether the Administrator had won or lost that determines whether the agency's position was substantially justified. *Application of U.S. Jet, Inc.*, *supra*, at 3. See also *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

In *Application of Petersen*, NTSB Order EA-4490 at 6 (1996), the Board held that, "when key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to hearing where credibility judgments can be made on those issues" (citing *Application of Caruso*, NTSB Order EA-4615 at 9 (1994); *Application of Conahan*, NTSB Order EA-4276 at 7-8 (1994); and *Application of Martin*, NTSB Order EA-4280 at 8 (1994) (in which the Board determined that the Administrator's position cannot be found lacking in justification simply because the law judge discredited the testimony of a particular witness)). But, in *Application of Scott*, NTSB Order EA-4274 at 5 (1994), the Board stated that, "[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows or should know that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs.

There is no question here that the Applicant was the prevailing party in the underlying proceeding. Accordingly, the issue that remains in determining whether or not he is entitled to an award under the EAJA is whether the Administrator was substantially justified in pursuing that certificate action against him.

The Applicant maintains that the Administrator had no basis, in fact or in law, for bringing an action alleging that his flight on July 10, 2010, violated FAR §§ 91.155(a), and 91.13(a). He asserts that the Administrator proceeded on an extremely weak and tenuous set of facts, and argues that the Administrator failed to take into account the video and photos taken by Steve Spruill of virtually the entire flight. The Applicant argues that the Administrator's entire case was based on the testimony of two FAA Inspectors, who provided testimony that was inconsistent between one another, inconsistent with their joint written statement and inconsistent with their sworn deposition testimony. However, later in his Application the Applicant concedes that the Inspectors' testimony during their depositions was "generally consistent" with their written statement. The Inspectors' joint written statement indicated that the Applicant's aircraft flew through clouds after a mid-tour landing on an inlet to Behm Canal. The Applicant points out that the Inspectors changed their testimony at hearing to assert that the incursion into clouds happened *before* the mid-tour landing. The Applicant argues that it appeared that the Administrator failed to even interview the two FAA Inspectors before bringing the action, but he does not offer any evidence to support that assertion.

The Applicant argues that the Administrator should have never brought the underlying certificate action against him because of the lack of reliable evidence, as the Inspectors did not even tell the same story. He further argues that the Administrator should have withdrawn the action once presented with the written statements of the passengers and the film and photos of the flight. The Applicant maintains that this is not a case where the Judge's decision was based on witness credibility. Rather, the Administrator simply did not have any reliable evidence of any violation and should never have brought the case.

that the Administrator should have withdrawn the action once presented with the written statements of the passengers and the film and photos of the flight. The Applicant maintains that this is not a case where the Judge's decision was based on witness credibility. Rather, the Administrator simply did not have any reliable evidence of any violation and should never have brought the case.

The Administrator argues that the underlying action was substantially justified and was based on a position that was reasonable in both fact and law, and further maintains that there is no contention by the Applicant that the Administrator's legal theory was not reasonable or that the facts alleged did not support that legal theory. The Applicant, the Administrator argues, does not allege that, if the testimony of the two Inspectors had been credited, that it would have been insufficient as a matter of law to sustain the violations alleged. Furthermore, the Administrator notes that he did interview the Applicant's witnesses, and the Applicant had provided to the Administrator complete copies of the photos and video taken by his witnesses. The Administrator argues that he indeed interviewed the Inspector-witnesses prior to deciding whether to proceed with this case, and avers that, upon review of all of the evidence, nothing was case-dispositive. The Administrator notes that Steve Spruill's videotape did not record the entire trip, as there were gaps in the recording, and insists that the testimony of the Applicant's witnesses was not dispositive when compared with the testimony of the Inspectors, who are both experienced instrument rated pilots. The Administrator argues that the case was resolved through an overall evaluation of the credibility of the witnesses in the case. Thus, the Administrator argues that there was a reasonable basis to proceed with the underlying certificate action, based upon credible evidence that supported a valid legal theory.

The Applicant filed a Reply to the Administrator's Answer, in which he argues that the Administrator failed to properly investigate the case; that the gaps in Steve Spruill's video is a meaningless "red herring;" and that the Administrator's counsel intentionally provided misleading information in the Answer to his Application. The remainder of the Applicant's Reply is spent reciting how unequivocal his lay witness pretrial written statements were in describing that the flight seeing tour did not fly through clouds.

While I have noted that the Administrator's answer placed the Inspectors who testified in this case in the wrong row of seats during the subject flight, this in no way mischaracterize the substance of their testimony, and appears to be a mere error. It does not alter my findings as to the credibility of the Inspectors' testimony at the hearing or whether the Administrator's action in the underlying matter was reasonably supported in fact and in law.

As to the gaps in the videotape of the flight, I specifically found that it did not establish a violation of the regulations cited in this case. I further found that the evidence presented at the hearing did not support the Administrator's

two FAA Inspectors who are experienced instrument rated pilots against the testimony of four lay witnesses and the Applicant, whose testimony I found to be credible.

The written statements of the Applicant's witnesses were far from dispositive in this case. Their credibility could not be assessed based on ink upon paper. There was nothing to guarantee that their testimony would be consistent at the hearing or that it would stand up to the Administrator's cross-examination. Furthermore, the Administrator could not speculate that I, in weighing the evidence, would believe lay witnesses' written statements over the written report of two Aviation Inspectors who were experienced pilots.

As to the Applicant's argument that the Administrator should not have initiated or continued to proceed with this case because of inconsistencies in the testimony of his witnesses at the hearing and how that testimony differed from their written report and deposition testimony, I do not find the Applicant's argument to be persuasive. The Applicant himself indicated in his application that the Inspectors' joint written statement and their deposition testimony were generally consistent. As to the fact that the Inspectors reviewed the evidence before the hearing and changed their version as to when the incursion into the clouds took place, I found that variation in their testimony to go to their credibility. This change, even if disclosed to me before hearing, would not have been dispositive of the case, necessitating cancellation of the hearing and dictating a ruling in favor of the Applicant. To the contrary, I would still have had to hear the Inspectors' testimony to determine whether their testimony in light of the change as to the sequence of events was or was not credible. Certainly, I would not have expected the Administrator to conclude that his witnesses were wholly without credibility and abandon the case. As the Administrator aptly points out, there is case precedent which holds that when two witnesses describe the same event, some inconsistencies are to be expected.¹

Contrary to the Applicant's assertion that this is not a case where the judge's decision was based on credibility, it was indeed a case I had to decide based on weighing and evaluating the credibility of multiple witnesses before rendering a decision in his favor. Under the Board's previous decisions referenced above in *Petersen*, *Conahan*, and *Martin*, an EAJA award is not appropriate where the outcome of the underlying air safety enforcement proceeding hinged on an evaluation of the witnesses' credibility.² In evaluating the totality of the facts and evidence in the underlying matter here, I concluded that the key and only dispositive issue in this case could only be decided upon a witness credibility assessment. In evaluating the evidence of record, including the witnesses' testimony, I specifically related that, in comparing the testimony of the parties' witnesses, I did not find the testimony of Inspectors Sawtelle and Billman to be reliable or persuasive, (Tr. 246), whereas I found the testimony of the Applicant

¹ *Administrator v. Dioria*, NTSB Order EA-4896 (2001); *Administrator v. Reese*, NTSB Order EA-4896 (2001).

² See p.4, *supra*.

and his witnesses to be more reliable and consistent, and, therefore, more credible. (*Id.* 247).

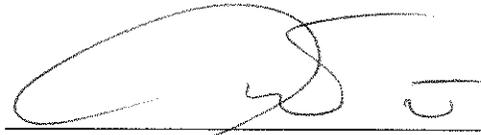
Therefore, based upon my consideration of this record in its entirety, I find that the Administrator's decision to initiate this action and to litigate it through the stage of an evidentiary hearing was justified both in fact and in law. Accordingly, I hold that the Applicant is not entitled to an award under the EAJA.

ORDER

Accordingly it is hereby ORDERED that:

The Applicant's Application for an award of attorney fees, costs and expenses under the Equal Access to Justice Act is denied.

Entered this 16th day of March 2012, at Washington, D.C.



Alfonso J. Montano
Acting Chief 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
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.