SERVED: November 26, 1997

NTSB Order No. EA-4608

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 14th day of November, 1997

Application of THEODORE J. STEWART for an award of attorney's fees and related expenses under the Equal Access to Justice Act (EAJA)	Docket 226-EAJA-SE-14084

OPINION AND ORDER

The Administrator appeals from the initial decision of Administrative Law Judge William R. Mullins, issued on January 31, 1996, awarding applicant $32,680.08 in attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").[1] We grant the appeal, in part.

The Administrator issued an Emergency Order of Revocation of applicant's airline transport pilot ("ATP") certificate on May 16, 1995, alleging three counts of intentional falsification

[1] A copy of the initial decision is attached.

regarding ATP ratings issued and received by applicant.[2] In counts one and two of her complaint,[3] the Administrator alleged that applicant issued a rating for a Lear Jet, and received a rating for a CASA CA-212, without the occurrence of proper checkrides. At the evidentiary hearing, the Administrator sought to prove these allegations with aircraft records maintained by the Drug Enforcement Agency ("DEA"), the owner of both the CASA and the Lear Jet. These records indicated that both aircraft had flown less time on the day of the purported checkrides than the time stated in the airman applications signed by respondent. Respondent, however, presented the testimony of DEA pilots who prepared the records which collectively indicated that the records might not be an accurate reflection of the actual time flown in either aircraft. At the conclusion of the evidentiary hearing, the law judge found that there was insufficient evidence to establish a violation on either of these two counts. Transcript ("Tr.") at 1344 and 1348.

The third count of the Administrator's complaint pertained to a Cessna CE-650 rating received by applicant after a checkride conducted in a Flight Safety International ("FSI") simulator. The Administrator alleged that applicant intentionally falsified his application for the CE-650 rating when he represented that he

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[2] Applicant was also a Designated Pilot Examiner ("DPE").

[3] The Emergency Order of Revocation serves as the Administrator's complaint in the proceedings before the law judge. See 49 C.F.R. 821.31(a).

was qualified to take the simulator checkride despite the fact that he had not completed FSI coursework and simulator training, as required by the FAA. Applicant, however, testified at the evidentiary hearing that he was unaware that he could not take the simulator checkride without having completed the FSI training. The law judge found the evidence insufficient to support a charge of intentional falsification, noting that the Administrator had shown, at best, that applicant should have known that he could not have obtained the rating without having completed the FSI training. Tr. at 1347-48. On the Administrator's appeal, we declined to reevaluate the law judge's credibility assessments and affirmed the law judge's dismissal of all counts of the Administrator's complaint. Administrator v. Stewart, NTSB Order No. EA-4387 (1995).

Applicant filed the instant EAJA application on August 22, 1995, and, on January 31, 1996, the law judge granted applicant $32,680.08 in fees and expenses. In his EAJA decision, the law judge declared that "it should have been clear to the Administrator that [intent,] an essential element of the offense of falsification[,] was absent with respect to each of the charges," and concluded that the Administrator's case, "based on suspicion and speculation[, was] plainly insufficient to meet the Administrator's burden of demonstrating that [s]he was substantially justified" in bringing her action against applicant. Initial (EAJA) Decision at 5.

The Administrator contests the law judge's finding that she

was not substantially justified in bringing the underlying action and also contests, in the alternative, the law judge's finding that the actions of applicant's counsel were not "so egregious in nature" as to justify withholding an otherwise proper EAJA award. Administrator's Brief at 4-5. Applicant, on the other hand, argues that the Administrator failed to conduct an adequate and proper investigation and, further, claims that counsel did not attempt to mislead the law judge. We address the substantial justification issue first.

We agree with the law judge, but for somewhat different reasons, that the Administrator was not substantially justified in maintaining an action on counts one and two of her complaint. As to count three, however, we grant the Administrator's appeal, for we find that, with respect to this count, the Administrator was substantially justified in proceeding to an evidentiary hearing.

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). To meet this standard, the Administrator must show that her decision to bring and maintain her 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 (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 her case, Pierce v. Underwood, 497 U.S. 552, 565 (1988), and is determined on the basis of the "administrative record, as a whole." McCrary v. Administrator, NTSB Order No. EA-2365 (1986); 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 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).

With respect to counts one and two, the Administrator argues that "the law judge made credibility findings in favor of [applicant's DEA pilot-witnesses] over the records themselves." Administrator's Brief at 11; but see Administrator v. Stewart, NTSB Order No. EA-4387 at 6 (1995) (stating that the Administrator's argument about the weight which should be given the DEA records "amounts to no more than a disagreement with the law judge as to the credibility of the [DEA pilot-witnesses]" who contested their accuracy). In support of this argument, the Administrator points out that substantial justification cannot be found lacking merely because credibility issues were decided against the Administrator. See Martin v. Administrator, NTSB Order No. EA-4280 at 8 (1994). A determination of substantial justification, however, also requires "some analysis of the nature of the 'information' on which the [Administrator]

proceeded" with her case. Catskill Airways, Inc. v. Administrator, 4 NTSB 799, 800 (1983). The Administrator's case "heavily ... relied" on the DEA records. Administrator's Brief at 12. As demonstrated during cross-examination of the Administrator's sponsoring witness, however, there are discrepancies within the DEA records which call into question their reliability as an accurate indication of flight time. See Tr. at 126-127; 131-132; 133-134; 139-140; 161-164. Although the Administrator argues that the first indication she received that the DEA records might be inaccurate was during applicant's case-in-chief, Administrator's Brief at 10, and appears to argue that there was no facial indication of inaccuracies within the DEA records,[4] it is the Administrator who carries the burden of establishing that she was substantially justified. The Administrator does not direct our attention to any efforts made by her to learn about the reliability of the DEA records. Instead, the Administrator's brief merely asserts that the

[4] The Administrator makes much of her claim that the DEA records would be admissible under the business records exception to the hearsay rule. Administrator's Brief at 7. The Administrator's sponsoring witness testified that the DEA records were used, inter alia, to track required aircraft maintenance and pilot currency. Tr. at 55-56; 75. According to the Administrator, "these DEA business records are afforded deference due to the qualifying factors" giving rise to the applicability of the hearsay exception. Administrator's Brief at 7-8. Even if we were inclined to accept this novel argument, which is rather tangential given the admissibility of hearsay in our proceedings, we think that under the circumstances of this case the business records exception would not apply because "the methods or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6); see Tr. at 126-127; 131-132; 133-134; 139-

(continued…)

Administrator was justified in "assum[ing]" the accuracy of the records.[5] Administrator's Brief at 9. See Petersen v. Hinson, NTSB Order No. EA-4490 at 7 (1996) (stating that the reasonableness of the Administrator's investigation is directly relevant to determining whether the Administrator was substantially justified). Under these circumstances, we think that the Administrator has not demonstrated that she was substantially justified in maintaining her action on counts one and two.

We turn now to the third count of the Administrator's complaint, pertaining to the CE-650 simulator checkride. The Administrator contends, essentially, that there was overwhelming circumstantial evidence tending to show that applicant knew he was not qualified to take the simulator checkride, and that the only evidence to the contrary was applicant's own denial of

(…continued)
140; 161-164.

[5] The Administrator also points out that the DEA pilots who testified on applicant's behalf refused to speak with the Administrator's investigator due to certificate actions pending against them. Administrator's Brief at 10-12. This fact might have changed the decision we reach, except for the fact that the Administrator has not shown that these particular witnesses were the only witnesses with the knowledge necessary to ascertain inaccuracies within the DEA records. Indeed, as the examples raised during cross-examination of the Administrator's sponsoring witness make clear, the records in some instances were facially inconsistent with each other. The Administrator has simply not demonstrated frustrated efforts to inquire into the nature of the DEA records and, instead, it appears from her brief that she merely assumed the accuracy of the records. Indeed, the Administrator does not even inform us of any inquiry about the DEA records made to her sponsoring witness.

culpability. Administrator's Brief at 16-17. In response, applicant argues that the Administrator relied on supposition rather than fact. Applicant's Brief at 11-12.

The critical issue -- in terms of proving a charge of intentional falsification -- was whether applicant knew he was not qualified to take the simulator checkride because he had not completed the required FSI training. As to whether the Administrator was reasonably justified in proceeding on this charge, we note that the Administrator knew of the following facts: (1) applicant was a DPE and ATP-rated pilot, with concomitant experience with the FARs, (2) applicant had previously obtained four type ratings through simulator checkrides in which extensive coursework and simulator training had been required, and (3) based on information provided by FSI's Director of Training, there were "significant irregularities and improprieties" in the way the CE-650 simulator checkride was set up which "cast doubt on the credibility of [a]pplicant's defense that he was innocent" of fraudulent intent. Administrator's Brief at 16-17. Indeed, the only information which contradicted the Administrator's theory of her case -- that applicant knowingly falsified his application -- was applicant's claim that he was not aware of the FSI training requirement.

We think the Administrator was substantially justified in proceeding to an adjudicatory hearing on the third count. In his EAJA decision, the law judge emphasized Administrator v. Hart, 3 NTSB 24, 26 (1977), where we stated that "circumstantial evidence

[of intentional falsification] must be so compelling that no other determination is reasonably possible." In doing so, the law judge erroneously applied a standard of proof to a determination of reasonableness under the EAJA. To be sure, filtering the facts of the Administrator's case through the applicable legal standard is part of the determination of whether the Administrator was substantially justified. However, we have held that the Administrator is substantially justified in proceeding to an adjudicatory hearing "when key factual issues hinge on witness credibility." Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994); Martin v. Administrator, NTSB Order No. EA-4280 at 8 (1994).[6] We have also held that the Administrator is "not required to accept uncritically" applicant's exculpatory claims. Thompson v. Hinson, NTSB Order No. EA-4345 at 8-9 (1995). Under the circumstances, we think that the Administrator was substantially justified in maintaining her action on the third count of her complaint.

Finally, we turn to the allegations of misconduct on the part of applicant's attorney, Steven L. Graff. The Administrator directs our attention to Exhibit 2 of applicant's EAJA application, an affidavit which bore the notation, "Original

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[6] This principle is not applicable to the DEA records presented in support of counts one and two. Unlike an evaluation of the credibility of a witness, which is a subjective task appropriately reserved for a law judge, the evaluation of the accuracy of documentary evidence requires knowledge about how and why, and by whom, such documents are created. The Administrator has not shown that she made a satisfactory effort to obtain such (continued…)

Signature to Follow in Separate Document." Administrator's Brief at 23.[7] It is undisputed that, despite knowing that the affiant still needed to obtain the permission of his superiors before he could sign the affidavit, Mr. Graff submitted the affidavit with the EAJA application. It is also undisputed that when Mr. Graff learned that the affiant was denied by his superiors permission to sign the affidavit, Mr. Graff failed to notify the law judge of that fact. The Administrator argues that regardless of whether applicant would otherwise be entitled to an EAJA award, the acts of Mr. Graff justify a denial of that award. Administrator's Brief at 22; see 49 C.F.R. 826.5(b) (stating that "[a]n [EAJA] award will be reduced or denied ... if special circumstances make the award sought unjust").

Mr. Graff claims that he did not immediately notify the law judge because he was still attempting to negotiate permission for the affiant's signature and he believed that, if necessary, he could notify the law judge of the lack of affiant's signature in applicant's reply to the Administrator's answer. Applicant's Brief at 15. Mr. Graff, pointing out that the law judge does not make a decision until all briefs have been submitted, argues that

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information about the DEA records.

[7] The Administrator also claims that Mr. Graff "acted unethically by repeatedly misrepresenting the facts" in his EAJA motions. Administrator's Brief at 22-23. The Administrator provides no real examples, however, and we are unable to discern any from the record. We interpret the examples of alleged misrepresentation cited by the Administrator to be more in the nature of zealous advocacy and argument.

the contents of the deposition were discussed with the affiant and the failure to obtain the affiant's signature was, essentially, a formality that simply rendered the document inadmissible. Mr. Graff acknowledges that his failure to promptly notify the law judge of his inability to obtain the signature of the affiant was "an error in judgment," but insists there was "not a deliberate attempt to mislead or defraud the [law judge]." Applicant's Brief at 16.

We agree with the law judge that Mr. Graff's conduct was not so egregious as to justify denying applicant his EAJA award. Important to our conclusion here is the fact that the affidavit did not misrepresent the substance of affiant's testimony.[8] That being the case, we do not see Mr. Graff's actions as evidencing bad faith. Cf. Application of Cross, NTSB Order No. EA-3601 at 4-5 (1992).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted, in part; and

2. This case is remanded to the law judge for a modification of applicant's EAJA award consistent with this opinion.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[8] Mr. Graff subsequently submitted a signed version of the affidavit in support of this appeal. It is substantially the same as the unsigned version.