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NTSB Order No. EA-4617

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 9th day of January, 1998

LEE H. ALLEN,)	
)	
Applicant,)	
)	
v.)	Docket 234-EAJA-SE-14453
)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	

OPINION AND ORDER

The applicant has appealed from the December 5, 1996 decision and order of Administrative Law Judge William R. Mullins that granted in part applicant's Equal Access to Justice Act, 5 USC § 504 (EAJA), application for attorney's fees and expenses.¹ For the reasons discussed below, the appeal will be denied.

On May 8 and May 15, 1996, the law judge presided over a consolidated hearing in the matters of Administrator v. Lee H.

¹A copy of the decision is attached.

Allen, SE-14453, and Administrator v. Excalibur Aviation, Inc., SE-14450. The Administrator had sought, by emergency order, revocation of applicant Allen's airline transport pilot (ATP) certificate and Excalibur Aviation's (Excalibur) air carrier operating certificate. Both respondents were represented by the same attorney. Applicant Allen is the Vice President and General Manager of Excalibur, and he is the only pilot authorized to operate aircraft under Excalibur's certificate.

The factual allegations contained in the complaints against applicant Allen and Excalibur were virtually identical. As to those flights in which Allen was not the pilot-in-command, however, the Administrator additionally alleged that because of his position with Excalibur and his involvement with management, all of the operations evidenced that he lacked the qualifications to hold an ATP certificate. The law judge upheld most of the allegations in both complaints, and he affirmed the revocation of Excalibur's operating certificate. However, he found that applicant Allen's ATP certificate should not be revoked, as the violations did not establish his lack of qualification to hold an ATP certificate. The law judge instead affirmed a 180-day suspension of Allen's ATP certificate. The Administrator did not appeal that finding.² Applicant Allen subsequently filed this application for attorney's fees and costs.

(..continued)

²The Board upheld the revocation of Excalibur's air carrier operating certificate. Administrator v. Excalibur Aviation, Inc., NTSB Order No. EA-4465 (June 21, 1996).

The law judge ruled in his EAJA decision that applicant had prevailed on certain charges, some of which the Administrator was not substantially justified in pursuing.³ Regarding a FAR § 91.207(c) allegation, the law judge found that applicant prevailed because the allegation was based on an FAA inspector's mistaken interpretation of the FAR.⁴ As to the FAR § 91.13(a) allegation, the law judge found that there was no substantial justification because the complaint against Allen did not allege that he was the pilot of any of the flights that were allegedly conducted in a careless manner.⁵ As to FAR § 91.169(a)(1), the law judge ruled that the Administrator was substantially justified in alleging this violation but that based on respondent's testimony there was not a preponderance of evidence to sustain a violation. Finally, the law judge ruled that the Administrator's demand for revocation was not excessive, and that the Administrator was substantially justified in seeking revocation of applicant Allen's ATP certificate, notwithstanding his determination that Allen should not be held vicariously responsible for the violations committed by Excalibur where his

³That determination has not been appealed by the Administrator.

⁴Allen was charged with operating an aircraft with the emergency locator transmitter batteries removed, but an FAA inspector testified that it was permissible to do so under an exception to the regulation.

⁵The law judge also dismissed the § 91.13(a) allegation against Excalibur, ruling that Board precedent did not support a finding of carelessness against a Part 135 operator as residual to a training deficiency violation unless the complaint also alleged some specific act of careless operation of an aircraft.

participation in the violations did not involve the exercise of the privileges of his airman certificate. The law judge awarded applicant fifteen percent (15%) of his application for attorney's fees and costs.

The only issue raised in this appeal is whether the law judge correctly calculated the award to applicant. Applicant asserts that because his success in avoiding the revocation of his ATP certificate was so significant, he is entitled to a substantial award. And, because he cannot segregate the hours devoted to his defense alone, he deserves an award of all of the attorney fees and costs incurred for the defense of both revocation orders against him and Excalibur. We disagree.

As we have already noted, the law judge found that the Administrator was substantially justified in pursuing the revocation of applicant Allen's ATP certificate. "To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, *i.e.*, the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of US Jet, NTSB Order No. EA-3817 at 2 (1993), citations omitted.

While applicant's appeal brief suggests that the issuance of the revocation order against him was inconsistent with Board precedent, precedent supports either suspension or revocation, depending on the circumstances. In Administrator v. Green and Wiggers, NTSB Order No. EA-4203 (1994), for example, we held that

where the director of operations and chief pilot's involvement in violations of his employer consisted of his acquiescence to unauthorized operations of aircraft piloted by other airmen, the violations flowed exclusively from his corporate responsibilities and not from his personal obligations as an ATP certificate holder, and his ATP certificate should not be subject to enforcement action. In Administrator v. Echo, Inc. and Rafter, NTSB Order No. EA-4150 (1994), *aff'd* Echo, Inc. v. Hinson, 48 F.3d 8 (1st Circuit 1995), we held that while the decision to continue operation of a helicopter in IFR conditions when the helicopter was authorized for VFR operations only supported revocation of Echo's air carrier operating certificate because Echo failed to provide the highest degree of safety to its passengers, that same conduct did not support revocation of the airman certificate held by the pilot-in-command and owner of Echo, because his decision to proceed when he should have terminated the flight evidenced poor judgment, but not his lack of qualifications under Board precedent. However, in Administrator v. Charter Flight Services, Inc., and Wiskus, 7 NTSB 185 (1990), revocation of the owner's airman certificate was upheld because he had falsified company records concerning other pilots' duty times. And, in Administrator v. Air San Juan/Chartair, Inc. and Marsden, NTSB Order No. EA-3567 (1992), the Board upheld revocation of the owner's ATP certificate because his extensive involvement in the circumstances surrounding the carrier's violations evidenced his own "lack of

compliance disposition." *Id.* at 9. Thus, the question of whether an owner, chief pilot, director of operations or other company officer might be personally subjected to certificate action along with the operating certificate of his corporate alter ego, is a factual matter to be resolved in each case. Under the circumstances presented here the evidence was certainly suggestive of a lack of compliance disposition on applicant's part. Therefore, we think, the Administrator was substantially justified in pursuing the revocation of applicant Allen's airman certificate and her demand for revocation was not excessive.⁶

Finally, we reach the question regarding the method used by the law judge that resulted in an award of 15% of the application. We believe the law judge's calculations appear to be a direct response to applicant's admission that the two proceedings were litigated as one. In other words, the law judge viewed the litigation "as a whole", as applicant suggested he should.⁷ Thus, of the 13 charges against Excalibur, all of which were also charged against applicant, 11, or 85% of the charges,

⁶Applicant argues that he is nevertheless entitled to an award, under a recent amendment to EAJA, 5 USC 504(a)(4), because the Administrator's demand for revocation was substantially in excess of the 180-day suspension imposed by the law judge. The Administrator has replied that § 504(a)(4) does not apply to applicant. Our reading of the statute is that, even assuming it applies, applicant would not meet the new § 504(a)(4) standard. We do not view the Administrator's choice to have been unreasonable when compared to the actual outcome; indeed we have found FAA to have been substantially justified in seeking the revocation sanction.

⁷The law judge even refers to the applicant as "Allen/Excalibur" in his EAJA decision.

were sustained. Accordingly, the law judge appears to have determined that the respondents below *together* prevailed on 15% of the charges, and applicant was entitled to an award of 15% of the expenses for the defense of that entire litigation, an amount he calculated to be \$2,444.75.⁸ Since, in our view, the Administrator's "case as a whole was well-grounded," Rafter v. Administrator, NTSB Order No. EA-4313 at 7 (1995), there is some doubt whether even this partial award could have withstood an appeal by the Administrator. As that issue has not been raised, we are satisfied that affirmation of the decision below is an appropriate disposition of this case.⁹

⁸Applicant's demand for all of the costs associated with defending both certificate actions is untenable. The defense of the revocation order issued against applicant's ATP certificate did not require counsel to expend any additional effort in his ultimately unsuccessful defense of Excalibur. The record shows that the same issues were defended with the same evidence and the same arguments were made at this consolidated hearing. Applicant has not shown that any part of the defense, when the litigation is "viewed as a whole, is fairly attributable to his attempt to show that he was qualified to retain his certificate." Grzybowski v. Administrator, NTSB Order No. EA-4413 at 6-7 (1996)(emphasis added). Nor does Hensley v. Eckerhart, 461 U.S. 424 (1983), cited by applicant, support his position. The Court in Hensley found that in reviewing an award of attorney's fees under 42 USC § 1988, where a plaintiff must litigate several claims and is successful on only a portion of them, but those successes are substantial when viewing the case as a whole, that plaintiff may be awarded attorney's fees for all of the hours reasonably expended on the litigation. Here there were two respondents that faced revocation, and the Administrator succeeded in full as to one of them, and in part as to the other.

⁹The law judge's estimate is not unreasonable. It is often difficult to calculate partial awards, and doing so is often an estimation. See, e.g., Scott v. Administrator, NTSB Order No. EA-4472 at 13 (1996).

ACCORDINGLY, IT IS ORDERED THAT:

The applicant's appeal is denied.

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