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NTSB Order No. EA-4614

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 5th day of January, 1998

ROBERT M. BRIGGS, Applicant, v. JANE F. GARVEY, Administrator, Federal Aviation Administration, Respondent.	)	Docket 242-EAJA-SE-14648

OPINION AND ORDER

The applicant has appealed from the March 12, 1997 decision and order of Administrative Law Judge Patrick G. Geraghty that denied applicant's Equal Access to Justice Act, 5 USC § 504 (EAJA) application for partial attorney's fees and expenses.[1] For the reasons discussed below, the appeal is denied.

On September 11, 1996, the Administrator issued an emergency order, revoking applicant's airline transport pilot (ATP)

[1]A copy of the decision is attached.

certificate. The Administrator alleged that applicant had conducted numerous FAR Part 135 operations when he did not hold a Part 135 air carrier operating certificate, and when he did not possess a current medical certificate for such operations.[2] The Administrative Law Judge, following a hearing on the merits, affirmed the allegations of FAR violations but reduced the sanction to an eight-month suspension of applicant's certificate. The law judge's sanction modification was based on his credibility determination in favor of applicant's testimony that applicant believed, albeit incorrectly, that he had properly conducted the operations under FAR Part 91 because he did not intend to accept compensation for the flights. Applicant appealed the law judge's initial decision to the Board, and we affirmed the FAR violations. We also further reduced the sanction to a 60-day suspension of applicant's ATP certificate. Administrator v. Briggs, NTSB Order No. EA-4502 (1996).

Applicant claims entitlement to a partial award of his attorney's fees and costs because he prevailed on the issue of sanction, and because, he asserts, the Administrator was not substantially justified in pursuing revocation of his ATP certificate. The law judge ruled that the Administrator was substantially justified in issuing an emergency order of

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[2]Part 135 of the Federal Aviation Regulations (FAR), 49 C.F.R. Part 135, sets forth the rules governing the carriage of cargo or passengers for compensation or hire by a commercial operator in aircraft that can seat no more than 20 passengers nor carry more than a 6,000 pound payload.

revocation, and he rejected the EAJA application. We agree with the law judge's decision.

The standard for our review of this issue is clear. "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 suggests that the issuance of the revocation order against him was inconsistent with Board precedent, there are cases that support revocation as an appropriate sanction (see Administrator v. Mealey NTSB Order No. EA-3634 (1992), and Administrator v. Sexauer, 5 NTSB 2456 (1987)) and, therefore, it cannot be said that the Administrator's legal theory was unreasonable.[3]

Applicant's argument that the Administrator's revocation action was unreasonable based on the facts, is wholly without

[3]Applicant asserts that this precedent is distinguishable. He claims that based on Sexauer, the Administrator should not have pursued revocation without obtaining evidence that payment had been made to respondent. We disagree. Applicant's own admission that he had a working relationship with Carson and that he had a written contract with the company, which he gave to the FAA, was more than sufficient evidence to support an allegation that the operation had been conducted for compensation. As to applicant's claim that Mealey is of no precedential value because the operations in that case spanned an 18-month-period, whereas here they occurred over a one-month-period, is equally untenable. Respondent conducted 24 operations without a Part 135 certificate in his possession. Moreover, because he was actually in the process of applying for a Part 135 certificate, we think it was reasonable for the FAA to believe that respondent was intentionally disregarding applicable regulations, which alone supports an allegation that he lacks qualifications to hold any

merit. The record shows that applicant was in the process of obtaining a Part 135 operating certificate in order to start his own helicopter business, Briggs Helicopter Support Services. His brother had already lined up applicant's first client -- Carson Services, the company where applicant's brother was employed. Applicant and the company entered into an agreement whereby applicant would transport loggers to and from various remote sites. The agreement specified that applicant would be paid $425 per hour. Because the company needed applicant's services, and because applicant feared his brother would lose his job if applicant did not perform when he was needed, applicant conducted the transport operations before he had obtained the Part 135 certificate. Applicant claimed that according to his reading of the Federal Aviation Regulations, he believed he could lawfully conduct the operations under Part 91 so long as he was not compensated for the work. Applicant neither billed the company or received payment for the subject flights, although the record shows that the company did not know it would not be billed, and that the company representative who was dealing with applicant believed that he had the Part 135 certificate in his possession at the time he provided the subject transport services.

As a result of a fatal accident that occurred during one of the flights for Carson Services, the FAA began an investigation into applicant's operations. Applicant actually produced a copy of a letter of agreement, which he described in a cover sheet as

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airman certificate.

a contract, to the FAA's investigating inspector. Applicant's written statement, which he also provided to the investigating inspector, states at the outset that applicant, the sole proprietor of Briggs Helicopter Services, was working for Carson Services at the time of the accident. There is not a scintilla of evidence to show that applicant ever mentioned to the FAA that he had neither asked for, nor received, any compensation. Under the circumstances, applicant's claim that the FAA was unreasonable in revoking his certificate based on the facts in its possession at the time of the issuance of the emergency order, is rejected.[4] The Administrator was substantially justified in issuing a revocation order against applicant's ATP certificate.

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.

[4]Applicant also argues that the Board's comments concerning FAA's development of interpretative rulings through adjudication, NTSB Order No. EA-4502 at 7, n.8, is pertinent to the determination of substantial justification here. While applicant's intent was relevant to the Board's decision to modify sanction, it played no role in the Administrator's determination to pursue revocation since the Administrator was unaware of the claim. Moreover, applicant's claim was only relevant to the Board if it was found credible, and even if the Administrator knew of the claim she would have been substantially justified in proceeding, absent some additional dispositive evidence. Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994).