SERVED: May 13, 2003

NTSB Order No. EA-5038

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 8th day of May, 2003

Application of BERCHMANS D. WICK for an award of attorney's fees and related expenses under the Equal Access to Justice Act (EAJA)	Docket 290-EAJA-SE-16105

OPINION AND ORDER

The Administrator appeals the October 16, 2001 written initial decision and order of Administrative Law Judge William R. Mullins, granting applicant's Equal Access to Justice Act ("EAJA") petition for fees and expenses totaling $2,927.47.[1] We grant the appeal.

In the underlying proceeding on the merits, the law judge dismissed the Administrator's order seeking to suspend respondent's private pilot certificate for 30 days for alleged violations of sections 91.13(a) and 91.119(c) of the Federal

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

Aviation Regulations ("FARs").[2] The Administrator's charges stemmed from her allegation that respondent operated his aircraft so as to pass "no more than 50 feet" from several persons on snowmobiles who were traveling along the frozen Yetna River in rural Alaska. In support of her charges, the Administrator introduced testimony from an FAA inspector -- one of the snowmobilers -- who testified that respondent flew along the river bed at low altitude, below the height of the surrounding trees, and flew nearly directly overhead of him upon rounding a bend in the river. Respondent testified that he never saw any snowmobilers, and claimed that he was scouting potential remote landing sites. The FAA inspector testified that the area where

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[2] FAR sections 91.13 and 91.119, 14 C.F.R. Part 91, state, in pertinent part:

> **Sec. 91.13 Careless or reckless operation.**
>
> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
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> * * * * *
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> **Sec. 91.119 Minimum safe altitudes: General.**
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> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> * * * * *
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> * * * * *

the incident occurred was not a suitable landing site. After an evidentiary hearing, the law judge dismissed all charges against respondent, and the Administrator did not pursue an appeal of the law judge's decision.

Applicant's amended EAJA application, submitted to the law judge, sought $2,927.47 in fees and expenses.[3] In support of the application, applicant claims that he informed the Administrator that he never "descended below 1,500 feet" except for landings, and argues, therefore, that the Administrator should have known that applicant's conduct did not violate FAR sections 91.119(c) or 91.13(a). Applicant also argues that the Administrator was not substantially justified in proceeding to a hearing because he claimed before the hearing that he was unaware that he flew within 500 feet of persons on the ground, and, noting that the Administrator's percipient witnesses did not testify that respondent appeared to be aware of having overflown them, because the "elements of the alleged violation require knowledge[.]" The Administrator opposed the application.

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

[3] Applicant has not submitted a supplement to the original EAJA application in connection with this appeal.

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 her case, Pierce v. Underwood, 497 U.S. 552, 565 (1988), and is determined 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 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 the Administrator was not substantially justified in proceeding to a hearing, and, because respondent prevailed on the merits, awarded all fees and expenses sought by applicant. The law judge explained that the Administrator was not substantially justified because she "failed to satisfy the knowledge requirement," or, in other words, that applicant "knew or reasonably should have known of the existence of the snowmobiles." Initial Decision at 2 (citing Administrator v. Nixon, NTSB Order No. EA-4249 (1994)). In support of his determination, the law judge noted applicant's "unrebutted testimony" that he was evaluating landing sites and didn't see the snowmobilers, the "circumstantial proof" that

applicant didn't see the snowmobilers, and, with regard to whether applicant should have known of the snowmobiles' presence, that the incident occurred in the "remote section of the Alaskan wilderness" and that the snowmobilers testified that they didn't see anybody else along the river.

In her appeal, the Administrator argues that the law judge erred by, essentially, evaluating the EAJA application in terms of what the hearing evidence ultimately demonstrated to the law judge rather than whether the Administrator had a reasonable basis in law and fact in proceeding to a hearing. She argues that issues of knowledge by applicant were in the nature of an affirmative defense, and that she was justified in presenting her prima facie case and challenging respondent's exculpatory claims at a formal hearing.[4]

[4] The Administrator also argues, in the context of whether applicant should have known of the possibility of encountering persons along his route, that her evidence demonstrates that, while remote, the area near the incident is "a far cry from uninhabited" and that "people use the frozen river as a highway using snowmachines and all-terrain vehicles to haul themselves and cargo up and down the river." She argues that her evidence established that this activity was all the more likely to be encountered on the day in question because of the Iditarod Sled Dog Race taking place nearby. She notes that her percipient witnesses were readily observable and out in the open, and, in this regard, notes that her witnesses had no difficulty observing applicant inside the cockpit as he passed by. She argues that applicant "made no effort to challenge the contention that he could have approached this area in a manner that would have allowed him to see if persons or vehicles were present in time to avoid coming within 500 feet of them." Finally, she argues that applicant's operation was the "functional equivalent of driving a car on the wrong side of a [rural] road while going around a blind curve" and observes that the FARs do not "allow one to merely assume no person or vehicle will suddenly appear in one's way."

We think the law judge erred, for this record makes clear that the Administrator had ample legal and factual justification for proceeding to a hearing on her charges. The witnesses and other evidence available to the Administrator were sufficient to support a prima facie charge that applicant violated FAR section 91.119(c), and, in accordance with long-standing case law on residual violations, FAR section 91.13(a), by flying as close as he did to the snowmobilers. The law judge is mistaken in his apparent belief that our precedent interjects a "knowledge requirement" into FAR section 91.119(c), or, indeed, most FAR violations. See, e.g., Administrator v. Arellano, NTSB Order No. EA-4292 at 3 (1994) (stating, in the context of an FAR violation stemming from a near-midair collision, that "Board precedent unequivocally establishes that a pilot need not be aware that he has flown impermissibly close to another aircraft in order to be found to have violated FAR section 91.111(a)") (citing reference omitted). Any analysis of whether respondent could or should have seen the snowmobilers, while perhaps relevant to the issue of sanction, is not germane to a determination of whether respondent flew within 500 feet of the snowmobilers (a fact for which the Administrator had compelling evidence) in violation of the proscriptions of FAR section 91.119(c). It was respondent's burden of proving such exculpatory claims, including his defense that any low flight fell within the ambit of the except for landings exception to the proscriptions contained in FAR section 91.119(c). See, e.g., Administrator v. Hart, 6 NTSB 899 (1988)

(the "except when necessary for landing" exception to minimum altitude requirements does not apply to low approaches to unsuitable landing sites). And, of course, the Administrator was not required to accept uncritically respondent's self-serving claims that he did not see any vehicles or persons while flying along the river, particularly where, as here, the Administrator's witnesses, who were operating their machinery at high speed, made detailed observations of respondent, himself, inside the cockpit, and his aircraft. See e.g., Application of Crocker, NTSB Order No. EA-4750 at footnote 5 (1999). The law judge's EAJA decision, on the other hand, rests in large part on his assessment of applicant's testimony, or, more precisely, on the veracity of applicant's claim, which he credited at the hearing, to have not seen the snowmobilers. In short, the law judge failed to assess the EAJA application under the proper EAJA standards and governing precedent.[5] We find that the Administrator was

[5] Even if the law judge's decision were sustainable, we note that he also failed to make any finding as to when, during the progress of the case, the Administrator's decision to proceed was not substantially justified, and, calculate an award from that point forward. Instead, the law judge appears to have granted a wholesale award that appears to improperly include fees and expenses tallied from the beginning of counsel's involvement in the case. Furthermore, we also note that the EAJA application states that applicant:

> was covered by the Aircraft Owner's and Pilot's Association [sic] ("AOPA") legal plan. Under the terms of this plan, the member's attorney is paid at a maximum rate of $140 per hour and is entitled to recover a portion of the funds from AOPA (80%) and a portion directly from the client (20%). The legal plan does not reimburse expenses incurred in the course of the representation

substantially justified in proceeding to a hearing on this matter, and, accordingly, the law judge erred in granting EAJA fees and expenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The law judge's decision is reversed; and

3. Applicant's application for EAJA fees and expenses is denied.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and CARMODY and HEALING, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur.

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of the member.

Application at 5. The application, prepared by applicant's counsel, also states that "[u]nder the AOPA legal plan, this firm accepts a lower hourly figure than it would normally charge for cases like this … and normally charges between $150 and $165 per hour for aviation-related legal matters depending on the type of work required." Id. Accordingly, because the fees and expenses allegedly incurred on behalf of applicant amounted to $6,386.27, and the AOPA Legal Services Plan has allegedly paid only $3,458.80, applicant sought to recover through EAJA the difference of $2,927.47. Had we agreed with the law judge's assessment of the substantial justification issue, it would have been necessary for us to remand for a determination of whether applicant incurred some or all of the fees and expenses sought. As the EAJA statutory provisions and our controlling precedent make clear, a "party" must, among other things, have "incurred" the fees and expenses sought. See Application of Livingston, NTSB Order No. EA-4797 (1999).