

discovery request, KDS filed a Motion To Compel Discovery And For Sanctions.

On November 8, 1990, agency counsel became aware of the existence of a lease back agreement between KDS and Sterling Aviation, Inc. According to agency counsel, after reviewing this document, a decision was made not to proceed with the civil penalty action. Therefore, on January 11, 1991, agency counsel filed a a motion to dismiss the notice of proposed civil penalty and the complaint. On February 22, 1991, the law judge issued a combined Order of Dismissal and Order Awarding Sanctions, and agency counsel subsequently appealed from the Order Awarding Sanctions.^{2/}

On March 20, 1991, KDS filed an application for fees and expenses seeking \$5,744.50 under the EAJA, 5 U.S.C. § 504. KDS asserted in its application that the exonerating lease back agreement was on file at the FAA's Flight Standards District Office (FSDO) during the entire pendency of this case, and that the FAA had simply ignored that document in deciding to pursue the investigation and prosecution. Agency counsel responded by filing a motion to dismiss the application, arguing that there was no "final disposition" of

^{2/} The Order Awarding Sanctions was ultimately reversed by the Administrator. See FAA Order No. 91-17 (May 30, 1991).

the case within the meaning of 14 C.F.R. § 14.20^{3/}, and that the application was premature, because agency counsel had appealed that part of the law judge's initial decision which awarded sanctions against the FAA.

On May 14, 1991, the law judge issued the Order Denying Respondent's Request For Additional Fees And Expenses, which is the subject of this appeal. In that order, the law judge denied agency counsel's motion to dismiss the application as premature, noting that the Order of Dismissal had not been appealed and was thus final. He then denied KDS's application for fees and expenses, citing five reasons:

(1) The request is not timely. Any such request should have been made before entry of the Order of Dismissal. For the Court to determine whether the position of the agency was or was not substantially justified would have required the taking of evidence.

3/ Section 14.20 provides, in pertinent part:

(a) An application may be filed whenever the applicant has prevailed in the proceeding, but in no case later than 30 days after the FAA Decisionmaker's final disposition of the proceeding.

* * *

(c) For purposes of this rule, final disposition means the later of:

- (1) The date on which an unappealed initial decision becomes administratively final;
- (2) Issuance of an order disposing of any petitions for reconsideration of the FAA Decisionmaker's Final order in the proceeding;
- (3) If no petition for reconsideration is filed, the last date on which such a petition could have been filed; or
- (4) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

(2) [KDS] agreed to the Order of Dismissal. Hence, [KDS] is not a prevailing party as contemplated by 5 USC 504.

(3) The burden of proof is upon the agency to establish substantial justification. The agency's ability to meet that burden was compromised when [KDS] agreed to a dismissal prior to asserting its claim.

(4) On the limited evidence before me it would appear the agency had a reasonable basis on which to proceed.

(5) 5 USC 504 contemplates loss of a case. Here there was no loss as contemplated by the statute.

Order Denying Respondent's Request For Additional Fees And Expenses at 1-2.

On appeal, KDS contests the law judge's reasoning, arguing, among other things, that (1) the application was timely because KDS only prevailed when the complaint was dismissed, not before; (2) KDS is the "prevailing party" in this case within the meaning of the EAJA; and (3) agency counsel did not respond to discovery requests which sought relevant information and documents, and should not be permitted to benefit from the consequences of its failure to produce evidence. In reply, the agency counsel asserts that the only issue on appeal is whether the agency was substantially justified in initiating and pursuing the enforcement action against KDS. The agency counsel then details the "evidence" which supported the alleged violation, and argues that the agency's pursuit of the enforcement action was substantially justified. Although the agency counsel concedes that KDS referred to the exculpatory lease back agreement in a letter dated August 7, 1990, counsel asserts in

the reply brief that KDS did not provide the agency with a copy of that agreement until November 8, 1990, and that the subsequent two-month delay in filing the notice to withdraw the complaint was reasonable.^{4/}

The law judge's decision denying KDS's application cannot stand. Contrary to the law judge's reasoning, KDS could not have filed its application before the case was dismissed because it would not yet have been a "prevailing party". It is clear, however, that after the Order of Dismissal, KDS was the "prevailing party" within the meaning of the EAJA. The agency's rules implementing the EAJA obviously contemplate "voluntary dismissal" as a basis for an EAJA claim. 14 C.F.R. § 14.20(c)(4) [see footnote 3]. See also, Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575 (9th Cir. 1941) (defendant considered "prevailing party" under the Copyright Act's attorney's fee provision after plaintiff voluntarily dismissed groundless complaint).

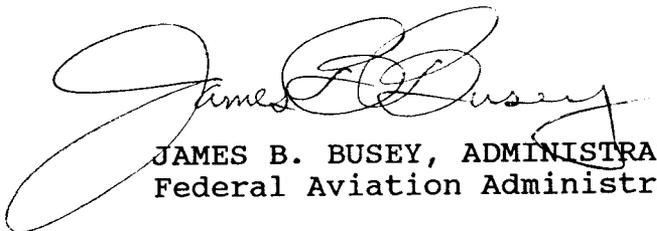
Having determined that KDS is the prevailing party, the only issue remaining in this case is whether the position of the agency was substantially justified. The burden of proving substantial justification is on agency counsel, who may avoid an award only by showing that the agency's position was

^{4/} KDS filed a reply to the agency's reply brief, which agency counsel moved to strike, pursuant to 14 C.F.R. § 13.233(f). In view of my disposition of this appeal, there is no need to consider whether good cause exists to accept KDS's reply to the agency's reply brief. Accordingly, the motion to strike is moot.

reasonable in law and fact. 14 C.F.R. § 14.04(a). Without any evidentiary record in this case, it would be difficult, if not impossible, for agency counsel to meet that burden. Unsworn assertions in the agency's brief do not sustain its burden of proof.

The Rules of Practice provide for "further proceedings", such as an evidentiary hearing, "when necessary for full and fair resolution of the issues arising from the application." 14 C.F.R. § 14.26(a). Further proceedings appear to be necessary in this case where significant factual issues remain controverted. Consequently, I am remanding this matter to the law judge for further proceedings to determine whether the agency was substantially justified in initiating and continuing this enforcement action. In addition, should the law judge determine that the agency was not substantially justified, then the law judge should determine what fees and expenses, if any, should be paid by the agency.

THEREFORE, the law judge's Order Denying Respondent's Request For Additional Fees And Expenses is reversed, and this case is remanded to the law judge for further proceedings pursuant to 14 C.F.R. § 14.26, and consistent with this opinion.



JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 25th day of October, 1991.