UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: BIRMINGHAM FLIGHT CENTER

FAA Order No. 2016-5

FDMS No. FAA-2014-0867[1]

Served: December 22, 2016

ORDER PARTIALLY GRANTING COMPLAINANT'S INTERLOCUTORY APPEAL OF RIGHT[2]

This interlocutory appeal challenges a June 3, 2016 sanctions order ("Order") issued by the Administrative Law Judge ("ALJ") in this civil penalty action brought by the Federal Aviation Administration ("FAA" or "Complainant") against Birmingham Flight Center ("BFC" or "Respondent"). The 41-page Order struck from the FAA's Complaint allegations that BFC had operated Cessna Citation Jet N525LP as a passenger-carrying flight from Birmingham, Alabama, to Destin, Florida, for compensation or hire, in violation of FAA regulations. The Order barred Complainant from introducing any evidence regarding the allegations, finding that during the investigation of the flight, the FAA Inspector:

- Failed to retain documents;
- "Polluted" a third-party witness by making statements critical of BFC;
- Promised confidentiality to that witness; and
- Discouraged that witness from sharing information with BFC.

The ALJ also found that the Complainant's attorney wrongfully attempted to discourage a witness from complying with a *subpoena duces tecum* served by BFC's counsel.[3]

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[1] Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/*. *See* 14 C.F.R. § 13.210(e)(2).

[3] Order at 34, 39.

Complainant's interlocutory appeal under 14 C.F.R. § 13.219(c)(3) contends that the ALJ exceeded her limited sanctioning authority under the applicable regulations, and requests that the FAA decisionmaker vacate the Order and direct that this matter be reassigned to another ALJ. For the reasons set forth herein:

- Complainant's interlocutory appeal is granted in part;
- The Order is reversed and vacated, and the case is remanded to the ALJ for further proceedings consistent with this Decision; and
- Inasmuch as the question of whether the ALJ prejudged the credibility of the witnesses is not properly before the FAA decisionmaker in this interlocutory appeal, Complainant's request that the Chief Administrative Law Judge reassign this matter to another ALJ is denied. [4]

I. Jurisdiction and Scope of Review

Complainant's interlocutory appeal is a matter of right. The scope of review is limited to determining the legal issue as to whether, as a matter of law, the ALJ imposed a sanction authorized pursuant to 14 C.F.R. part 13, Subpart G. However, in order to determine whether the ALJ had sanction authority under 14 C.F.R. §§ 13.217 and 13.220, and whether any sanction was proportionate to the underlying conduct, it is appropriate to review the ALJ's factual findings to determine whether each finding of fact is supported by a preponderance of the reliable, probative and substantial evidence. 14 C.F.R. § 13.233(b)(1).

II. Discussion

A. ALJs Have Limited Authority to Impose Sanctions

14 C.F.R. § 13.205(b) expressly circumscribes the ALJ's sanctions authority in two distinct ways – it limits the conduct for which sanctions may be imposed and the types of sanctions that may be imposed:

> (b) *Limitations on the power of the administrative law judge.* **The administrative law judge shall not** issue an order of contempt, award costs to any party, or **impose**

[4] The ALJ may disqualify herself if she deems it appropriate. 14 C.F.R. § 13.205(c). Also, Complainant may file a motion for disqualification with the ALJ under 14 C.F.R. § 13.218(f)(6).

> **any sanction not specified in this subpart.** If the administrative law judge imposes any sanction **not** specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4)[sic] of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding. (emphasis added).

The ALJ referenced and relied on two regulatory provisions to impose sanctions:

- § 13.217(f) - which authorizes sanctions for failure to comply with a joint schedule; and
- § 13.220(n) - which authorizes sanctions for failure to comply with a discovery order or order to compel discovery.[5]

Under either provision, the sanctions may include:

- Striking a portion of the party's pleadings;
- Precluding the party's prehearing or discovery motions;
- Precluding the admission of a portion of the party's evidence at the hearing; or
- Precluding a portion of the testimony of the party's witnesses at the hearing.

Thus, the only legal issue to be decided at this time in this interlocutory appeal of right is whether the ALJ's sanctions decision is supported by the Complainant's failure to comply with either the joint schedule (§ 13.217(f)) or a discovery order or an order to compel discovery (§ 13.220(n)). Because no hearing was held on the conduct issues of concern to the ALJ, she failed to make the requisite findings or determinations as to either:

- Whether they were prohibited by, or bore any relationship to, the subsequently-issued joint scheduling or discovery orders; or

- The circumstances that gave rise to such conduct; and

- How the conduct prejudiced the ALJ's ability to make fair and impartial finding of facts after a hearing.

B. Most of Complainant's Actions or Inaction Occurred Prior to Entry of a Discovery or Joint Scheduling Order

The ALJ's Order primarily is based on the FAA Investigator's actions and inactions that allegedly occurred in 2012 and 2013[6], before either the Respondent's November 26, 2014

[5] Order at 41. 14 C.F.R. §§ 13.217(f) and 13.220(n).

Request for Hearing or the April 7, 2015 Joint Discovery Orders.[7] Thus, the regulatory basis for the ALJ's sanctions order is undermined by the lack of temporal proximity between the Investigator's actions and inactions in 2012 and 2013 and either the Respondent's Request for a Hearing or the ALJ's entry of scheduling and discovery orders.

C. ALJ's Four Other Referenced Sources of Authority

Nonetheless, the ALJ also justified her sanctions Order by referencing and relying on four disparate sources of authority, including:

- FAA Order 2150.3B; "FAA Compliance and Enforcement Program;"
- The American Bar Association's Model Rules of Professional Conduct;
- Portions of the regulatory notice published in the Federal Register for Part 13;[8] and
- By analogy, the inherent authority of Federal courts under Article III of the United States Constitution.

These sources are reviewed to determine whether, singly or in tandem, they provide appropriate support for the ALJ's sanctions decision.

1. FAA Order 2150.3B. FAA Order 2150.3B establishes procedures and requirements with regard to the actions of FAA investigators. Indeed, it evidences the Agency's commitment to

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[6] These actions included multiple "condemnations" of Respondent in email messages as the investigator worked with a key witness, Dr. Alan Long, from September 21, 2012 to October 13, 2012 (Order at 14-17). It is noted that seven enumerated emails listed on pages 16-17 of the Order refer to emails from October 3 to October 12, "*2016*," with the citation to Exhibit J of the original Motion for Sanctions. The cited exhibit, however, shows that the exchanges occurred in "2012." Given that the Order was issued in 2016, the erroneously stated years in the Order's citations are best viewed as innocuous typographical errors, rather than findings of fact that are unsupported by the record. These "condemnations," in the view of the ALJ, "polluted" the witness (Order at 18).

Relying on the text of these messages, the ALJ also found that the investigator encouraged Dr. Long not to cooperate with the Respondent, even after the investigator sent a Letter of Investigation that notified the Respondent of the need to preserve records (Order at 21). Faulting the investigator further, the ALJ found that contrary to established FAA procedures, the investigator deleted email communications relevant to the case in the "fall of 2013" (Order at 23, 25).

[7] Order at 3, n.5 and n.6.

[8] Order at 11-14, and 40.

securing and preserving evidence,[9] securing reliable witness statements,[10] and appropriately interviewing witnesses during the investigation.[11] It expressly requires FAA personnel "to use their experience and sound judgment in carrying out their compliance and enforcement responsibilities."[12] Those are essential obligations of all FAA personnel with regulatory compliance and enforcement responsibilities and nothing in this decision obviates those obligations. However, as the first page of Order 2150.3B clearly and unambiguously provides, "This order does not create any right or benefit, substantive or procedural, enforceable at law by any party against the FAA, its officers, or its employees."[13]

Thus, enforcement of the investigative processes and standards set forth in FAA Order 2150.3B is a management duty of the FAA[14] - the Order simply does not confer a right on Respondent to enforce these management procedures and requirements, and certainly it provides no authority to the ALJ to supervise an FAA investigator's conduct during the Agency's investigative stage of a matter. Accordingly, FAA Order 2150.3B provides no basis for the ALJ's sanction decision.

2. *ABA Model Rules of Professional Conduct*. Similarly, for several reasons the ALJ cannot rely on the ABA Model Rules of Professional Conduct, Rules 3.4 and 3.8 (2014 ed.) as a source of her sanctions authority.[15] First, neither Rule 3.4 nor Rule 3.8 applies to the conduct of the Inspector in this case. The pertinent sections of Rule 3.4 – Rule 3.4(a), (e) and (f) –

[9] FAA Order 2150.3B (thru change 11), at page 4-12, ¶ 10.a. (Oct. 1, 2007)

[10] *Id* at page 4-15, ¶ 10.c.(6).

[11] *Id*. at page 4-14, ¶ 10.c.(3).

[12] *Id*. at page 1-1, ¶ 2.b.

[13] *Id*. at page 1-1, ¶ 2.c. Of course, the Agency expects and encourages ALJs to refer for Agency review concerns about the conduct of any Agency employee.

[14] As set forth in Section II.E herein, the FAA exercised that management responsibility by the Agency's Chief Counsel asking for and my directing the Agency's Office of Audit and Evaluation to conduct a thorough and prompt internal review of both the Inspector's and Counsel's handling of this matter and to report to me the results of such investigation.

[15] Order at 13-14, 28-29.

prohibit certain conduct by attorneys, not investigators. And, Rule 3.8 applies to the responsibilities of prosecutors in criminal matters, not to civil or administrative actions. Second, nothing in the applicable Agency regulations - §§ 13.205, 13.217 and 13.220 – establishing the scope of an ALJ's sanctions authorizes the ALJ to impose a sanction for violations of the ABA's Model Rules.

3. *Part 13 Rules of Practice for FAA Civil Penalty Actions*. Finally, the ALJ's reliance on passages found in the Federal Register discussion of the Rules of Practice for FAA Civil Penalty Actions; Final Rule, published on July 3, 1990, is misplaced. None of referenced portions suggest that the FAA intended the Rules to provide ALJs broad authority to sanction the Complainant for actions *prior to* the filing of Respondent's Request for Hearing. For example, in one passage, the FAA explained generally that "there are ample protections built into the FAA's adjudicative and appeal processes to check overzealous prosecution and ensure a fair adjudication based on the facts and the law."[16] However, the protections to which the FAA referred are those set forth in the proposed rules themselves: providing for the separation of functions by DOT ALJs, FAA attorneys who prosecute cases and the FAA decisionmaker who resolves appeals; and the right of a respondent to petition a United States Court of Appeals for review of an Administrator's decision. Those enumerated protections simply do not expand the ALJ's regulatory proscribed sanctions authority beyond § 13.217(f)) and § 13.220(n)) to include the ALJ having general oversight of FAA Inspectors conducting investigations in the regular course of their duties. Oversight of FAA employees during an investigation *prior to* the Request for Hearing or issuance of a Discovery or Joint Scheduling Order decidedly is the Agency's responsibility.

4. *Analogy to the Inherent Authority of U.S. Federal Courts*. Finally, the ALJ referenced and relied on several *legal treatises and scholarly works* that discuss the inherent power of federal district courts exercising authority pursuant to Article III of the United States Constitution. Analogies to the powers of Article III courts, however, must be tempered by the fact that the Department of Transportation's Office of Hearings is not a federal court exercising Article III powers. The Office of Hearings' power to impose sanctions is expressly constrained by the

[16] 55 Fed. Reg. 27548, 27551 (Jul. 3, 1990).

Administrative Procedure Act and the Agency's published procedural regulations. 5 U.S.C. §§ 556(c)(11), 558(b) (2012). Specifically, § 556(c)(11) empowers ALJs to take "*actions authorized by agency rule consistent with this subchapter*." As the United States Court of Appeals for the District of Columbia Circuit recently explained, ALJs do not have all the powers vested in federal courts, and agencies are not required to delegate full decisional authority to them.[17] *Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n*, 832 F.3d 277, 281-282, 288-289, 2016 WL 4191191, at *2, *6 (D.C. Cir. 2016). As pertains to the present matter, neither the Department of Transportation nor the FAA delegated full sanctions authority to the ALJ, and the expressly limited sanctions authority found in Agency regulation § 13.205(b) cannot be overridden or expanded by analogies to the inherent powers of a federal district court exercising power under Article III.

Thus, none of the above authorities cited in the ALJ's sanctions Order, singly or in tandem, authorize the imposition of sanctions for conduct within the scope of the Agency's management of the investigative stage of a matter and prior to the Request for Hearing or entry of either a Discovery or Joint Scheduling Order.

D. Agency Regulations May Support the Imposition of An Appropriate Sanction For Pre-discovery Action or Inaction that Materially Impacts the Adjudication.

Having determined that neither Agency regulations nor the four other sources relied on by the ALJ authorize her sanctions decision in this matter, it is important to analyze one remaining basis for the sanctions Order not articulated or relied on by the ALJ. As noted above, Sections 13.217(f) and 13.220(n) permit the ALJ to impose sanctions for failure to comply with a discovery or a joint schedule order.

In this matter, the ALJ directed that the FAA respond to BFC's April 20, 2015, discovery requests by September 30, 2015. (Amended Scheduling Order, dated Sept. 1, 2015, at 5, ¶4.) The FAA complied by responding on September 15, 2015. (Motion for Sanctions, Exh. F.) The inquiry should not end there, however. Section 13.217 (f) should not be read so narrowly as to

[17] 5 U.S.C. § 556(c)(11).

preclude the imposition of sanctions when the Agency is unable to respond fully to discovery requests or other aspects of discovery covered by a scheduling order due to Agency actions that occurred prior to the issuance of those orders.

Actions of an Agency Inspector or Attorney, during the Agency's internal investigation prior to Respondent's filing a Request for Hearing, theoretically could adversely impact the nature or scope of the FAA's responses to discovery requests in subsequent stages of the litigation within the ALJ's supervision. An ALJ may impose an appropriate sanction to the extent that the FAA's responses were incomplete, misleading, or omitted information due to the actions of Agency personnel, even where the actions occurred prior to the filing of the Request for Hearing. However, before imposing such sanctions the ALJ must analyze the discovery requests and responses and develop the record necessary to determine why the actions or inaction occurred and whether and to what extent the alleged actions or inactions materially impacted or prejudiced the Respondent's right to a fair and impartial determination of the alleged regulatory non-compliance. As discussed below, in the context of the issues identified in the Order, the ALJ did not develop the requisite record to support the imposition of sanctions in this case.

1. *Non-Retention of Documents*. First, the Enforcement Investigative Report (EIR) contained only two documents written by the witness, Dr. Long – his October 3 and October 12 emails to the Inspector.[18] The EIR did not include:

- Dr. Long's October 1, 2012 statement;
- The Inspector's email messages asking for additional information or encouraging witness cooperation; or
- Some of Dr. Long's responses to the Inspector's email messages, including Dr. Long's October 5, 2012 responses.[19]

[18] The EIR was attached to the Administrator's Initial Disclosures, served on April 17, 2015. See Motion for Sanctions, Exhibit C.

[19] Compare Motion for Sanctions, Exhibit C, to Exhibits J and K (Dr. Long's responses to subpoena rider requests.). These documents clearly would have been responsive to requests 18 ("[a]ll correspondence and e-mails sent to or sent from Dr. Alan Long related to the subject flight") and 25 ("[a]ll documents generated by" the Inspector "related to this case") included in Respondent's Requests for Production of Documents. (Motion for Sanctions, Exhibit E.)

Those documents also were not included in the FAA's September 15, 2015, responses to the discovery request[20] because they apparently were not retained by the Inspector and the FAA attorney apparently was not aware of the documents or their apparent destruction when he responded to the discovery request.[21] Nevertheless, in response to a subpoena, Dr. Long provided the documents to the Respondent.[22] In that regard, the ALJ noted:

> Obviously certain e-mails exchanged between Inspector Rushton and Dr. Long, although destroyed by Inspector Rushton, have been recovered from Dr. Long via subpoena. If the recovery of this data was the only problem, striking the pleadings would not be warranted because the evidence has been found.[23]

Thus, it is true the FAA should have retained the documents in anticipation of litigation and was not able to provide full responses to discovery requests. However, it appears the material the FAA was not able to provide was provided to the Respondent through Dr. Long.

Second, the ALJ held that "it must be assumed on behalf of the Respondent – the disadvantaged party – that Inspector Rushton may have selectively withheld other relevant investigative information from the EIR as well, which is still unknown or which may never be recovered." (Order at 29.) There is no basis in this record to support this assumption and it cannot provide a basis for the sanction ordered here. (Order at 38.)

In sum, the record does not establish that the Inspector's failure to retain the documents had a material prejudicial impact on Respondent's ability to answer and defend whether it operated flights as passenger-carrying flights for compensation or hire in violation of FAA regulations. Only a hearing affords the ALJ the opportunity to determine how the Inspector's failure to retain documents impacts the credibility of the Inspector, Dr. Long or any other witness as to

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[20] *See* Response to Respondent's Discovery Requests, dated September 15, 2015, (Motion for Sanctions, Exhibits F and G.)

[21] The circumstances of what the attorney knew (or should have known) and by when also warrants a more complete record.

[22] *See* Response in Opposition to Motion for Sanction, Exh. A (Declaration of Yancey Rushton).

[23] Order at 38.

Respondent's alleged non-compliant flights or justifies striking the pleadings as to such non-compliance.

2. *Pollution of a Key Witness.* The FAA's response to interrogatories included the following description of Dr. Long's anticipated testimony:

> Most notably, Dr. Alan Long may testify about scheduling flights with Respondent, including the subject flight of this case. Dr. Long may testify that the instant flight was scheduled as a purely business/charter flight, and that there was no discussion of a "demonstration" flight.

The ALJ found that the Inspector had polluted the perceptions of Dr. Long by repeatedly attacking and criticizing the Respondent and sending Dr. Long materials about past crashes involving aircraft unlawfully carrying passengers for compensation or hire. She wrote that "by October 3, 2012, Dr. Long [the witness and passenger for whom the flight was arranged] had conversed with Inspector Rushton several times, had read materials Inspector Rushton had given to him, and was echoing Inspector Rushton's condemnation of Respondent." (Order at 15). In that email message, Dr. Long wrote, "I have zero tolerance for what's happening at BFC." (Motion for Sanctions, Exh. J, at LONG000451, (Oct. 3, 2012 3:37 PM.) That *one* email message was the only evidence to which the ALJ referred to substantiate her finding that the Inspector's conduct "destroyed Dr. Long's potential as an evidentiary witness." (Order at 19) and that "[w]itness [p]olluting [d]id [occur." (Order, at 18.) In the absence of a hearing, the evidence in the current record simply does not support a finding of "pollution."

First, as the record makes clear, differences in the statements are explained by other factors less nefarious than "pollution" by the Inspector. For example, during his first conversation with Inspector Rushton in September 2012 and in his October 1, 2012 statement, Dr. Long noted he had talked months earlier to Respondent's Steven Pickett about buying a jet.[24] Yet, neither of Dr. Long's October 3, 5, or 12, 2012 emails note that he had spoken months earlier to Respondent (and others) about the possibility of purchasing a CJ.[25] It may well be that

[24] Motion for Sanctions, Exh. C, Record of Conversation with Dr. Long dated Sept. 21, 2012.)

[25] (Motion for Sanctions, Exh. J,at LONG000449 (statement dated Oct. 3, 2012), at LONG000461 and LONG000462(email from Alan Long to Yancey Rushton, dated Oct. 5, 2012 2:50 PM and 2:56 PM); at LONG000473-000475 (email from Alan Long to Yancey Rushton, dated Oct. 12, 2012 6:04 pm).

Dr. Long's earlier oral and written statements reasonably triggered the Inspector's early concern as to whether Dr. Long was willing to fully cooperate and be fully truthful in the FAA's investigation, thereby requiring the Inspector to implore Dr. Long to understand the significant aviation safety risks resulting from private pilots carrying passengers for compensation or hire. Or, it may be Dr. Long's later statements simply resulted from the fact that such statements/email messages were in response to particular questions asked by the Inspector, for the most part, seeking additional information about payments for the flight, and the Inspector not asking in his October 3, 5, or 11 email messages (supplied in response to the subpoena) whether Dr. Long had *at any time in the past* considered purchasing a CJ. (*E.g.*, Motion for Sanctions, Exh. J, at LONG000445 8:21 AM (email from Rushton to Long, dated Oct. 3, 2012, 8:21 am), at LONG000460 (email from Rushton to Long, dated Oct. 5, 2:16 pm); at LONG000461 (email from Rushton to Long, dated Oct. 5, 2012 2:15 PM); at LONG000463 (email from Rushton to Long, dated Oct. 11, 2012 3:08 PM.)

Second, the Inspector's several email messages to Dr. Long responsibly sought basic factual information that Dr. Long did not cover in his October 1, 2012, statement. Dr. Long's responsive emails actually provided necessary factual details about bills that he received, whether he had paid these bills and whether before the flight he had heard of the entity (Team Financial) that eventually sent him a bill.[26] These necessary factual details surely are not matters of perception and therefore would not be subject to "pollution" or any other form of adulteration due to any emotional response by Dr. Long to the Inspector's "negative" comments.

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[26] *I.e.*, Motion for Sanctions, Exh. J, LONG000461 (Long to Rushton, Oct. 5, 2012 2:50 pm), LONG000462(Oct. 5, 2012 at 2:56 pm).

For example, he explained in an emailed statement dated Oct. 3, 2012, that "[a]fter … Steven Pickett told me it would be considered a demo flight, I received emailed invoices from both pilots Shawn Flowers and Justin Lollar. I also received a paper invoice through the mail for $1950 from Team Financial for the use of the CJ." (Motion for Sanctions, Exh. J., LONG000449 (Oct. 3, 2012, statement by Dr. Long.) Dr. Long attached copies of emails from the pilots and copies of bills for their services. (I.e., Motion for Sanctions, Exh. J,LONG000446 (forwarded email from Justin Lollar to Alan Long, dated Sept. 23, 2012, 2:20:53 PM, requesting Long send $400 pilot fee to his home address)); at LONG000448 (invoice for $450, "pilot day rate" from Shawn Flowers.)

Third, a review of the EIR and the emails supplied by Dr. Long suggest that Dr. Long's understanding of the essential fact - that the September 18, 2012 flight was a business charter flight and not a demonstration flight - did not change between his September, 2012 first interview with the Inspector and his October 12, 2012, written statement.[27]

In sum, the ALJ's finding of witness "pollution," based upon her assumption that the Inspector's remarks *must have* destroyed Dr. Long's value as a credible witness, simply is not supported by the current record and only a hearing can develop testimony necessary for the ALJ to assess the veracity and weight to be afforded to any such testimony.

3. Promise of Confidentiality in Exchange for Helping the FAA. Based upon the email messages supplied by Dr. Long in response to a subpoena, the ALJ found the Inspector had promised confidentiality to Dr. Long. The ALJ wrote "the email records preserved by Dr. Long and produced by the respondent in support of sanctions also demonstrated that Inspector Rushton promised Dr. Long certain confidentiality protections if he helped the FAA, …." (Order at 20.)

Under my interpretation of the potential scope of Sections 13.217(f) and 13.220(n) set forth herein, if the anticipated testimony, as described by the FAA in its response to discovery, was tainted by a promise of confidentiality, then a sanction might be appropriate. However, the current record does not support finding such a promise of confidentiality.

The inspector's email to Dr. Long provided: "Even if you signed something, I give you my word that you will be left out of this … I know you don't want to be involved and I will keep you out of this but I need your help. [28] This message is equally read as having perfectly innocuous and reasonable meanings in an investigatory context that the Inspector was reassuring the witness that enforcement action would not be taken against him for arranging

[27] Compare Motion for Sanctions, Exh.C, (EIR - Record of Conversation with Dr. Long dated Sept. 21, 2012); Exh. J, at LONG000442 (Statement dated Oct. 1, 2012) and Exh. J, at LONG000474 (Statement dated Oct. 12, 2012.)

[28] Order at 20; Motion for Sanctions, Exh. J, at LONG000445 (Email to Alan Long from Yancey Rushton dated Oct. 3, 2012, 8:21 am.)

for this flight, as the Inspector wrote in his declaration,[29] or an attempt to reassure the witness that he would only have to spend limited time away from his practice to participate in the future in the event the civil penalty action actually went to hearing.

Accordingly, the record does not support the ALJ's finding as to confidentiality, and whether the Inspector promised confidentiality and, if so, did such promise have a material impact on the veracity of Dr. Long's statement can only be determined following a hearing.

4. Interference with Respondent's Right to Discovery. Further, the ALJ held the Inspector interfered with Respondent's ability to gather relevant information in two ways. First, "the email records preserved by Dr. Long and produced by the Respondent in support of sanctions also demonstrated that Inspector Rushton … instructed Dr. Long not to talk to, or share information with, the Respondent" and that the Inspector persuaded Dr. Long not to speak with Respondent. (Order at 20, 22.) However, it simply cannot be determined from the record whether Dr. Long would have been inclined to talk to the Respondent in response to the Inspector's inquiries had the Inspector not urged him to "keep all this to yourself." (Motion for Sanctions, Exh. J, at LONG000458.) Equally as important, however, the email messages establish that after Respondent contacted Dr. Long, the Inspector advised him, to "do whatever you need or feel like doing" and "Do what you want and I don't care." (Motion for Sanctions, Exh. J, at LONG000466 (email from Rushton to Long Oct. 12, 2012, 10:57 PM.)

Second, the ALJ also noted, "Neither Inspector Rushton nor Dr. Long kept a telephone record log regarding Inspector Rushton's voicemail message. *It must be presumed, on behalf of the Respondent*, that the voicemail message contained similar condemnations of the Respondent and warnings about communicating with the Respondent." (Emphasis added.) (Order at 22, n.50.) There is no basis for this presumption, and the ALJ's finding that the Inspector orally "warned" Dr. Long is unsubstantiated.

[29] Response in Opposition to Motion for Sanctions, Government Exh. A [Rushton Declaration], ¶ 6

In sum, the current record does not support the finding as to interference, and the issue of whether the Respondent was prevented or impeded from gathering relevant information can only be determined following a hearing.

5. Contact between Complainant's Attorney and a Subpoenaed Witness. Finally, the ALJ also imposed sanctions based upon her finding the FAA attorney had contacted Dr. Long, in connection with a subpoena issued at the Respondent's request.[30] The ALJ found that this conduct deserved a sanction because it obstructed Respondent's right to obtain evidence. This finding is unsupported by the record for three reasons. First, the ALJ's Order acknowledged that the FAA attorney contacted the witness to determine whether grounds existed for a motion to quash the subpoena, and that the FAA attorney made it clear in his communications that the witness was *required to comply with the subpoena and release the requested documents* unless a motion for relief from the subpoena was filed.[31] There is nothing inherently improper -- much less sanctionable -- in the fact of such communications occurring between the FAA attorney (or any attorney) and the third-party witness who has received a subpoena. Indeed, Section 13.228(b) permits the filing of a motion to quash or modify a subpoena, listing various grounds for quashing a subpoena. By so providing, the Section implicitly contemplates contact between the Complainant's (or any party's attorney) and a subpoena recipient, seeking to inquire whether a factual basis exists for a motion to quash. One acceptable way for Complainant's or any party's attorney to know whether grounds exist to file a motion to quash the subpoena is to discuss the same with the subpoena's recipient – which apparently is all the FAA attorney did. Indeed, an attorney who does not make a "reasonable inquiry" could face sanctions under § 13.207 if it is later determined the attorney filed a frivolous motion to quash.[32] Ultimately, in this case a motion to quash the subpoena was not filed and apparently the witness provided documents sought through the subpoena.[33]

[30] BFC served the subpoena on Dr. Long on October 21, 2015. (Motion for Sanctions, Exh. H.)

[31] Order at 30-31 (quoting various email messages to Dr. Long).

[32] Like Fed. R. Civ. P. 11, 14 C.F.R. § 13.207(b) provides that signatures on filed documents constitute a certification that a "reasonable inquiry" has been made.

[33] Order at 30-31.

Second, the ALJ's ability to impose a sanction under §§ 13.217 and 13.220 requires evidence that these actions had an impact on the party's compliance with a scheduling order, a discovery order or an order to compel. No such connection has been established here.[34]

Third, the scheduling orders in this case did not preclude contact between the attorney and Dr. Long or any other third-party witness, and as Complainant notes, the ALJ did not find that the FAA attorney violated any specific provision of those orders.[35] Hence, nothing in the current record warrants a sanction under §§13.217(f) or 13.220(n) based on the actions of the FAA attorney.

In sum, the current record does not support a sanction based on the FAA Attorney (or any attorney) contacting a witness to determine whether grounds existed for a motion to quash to subpoena, especially when the FAA attorney made clear to the witness that he was *required to comply with the subpoena and release the requested documents* unless a motion for relief from the subpoena was filed.

D. Re-assignment of the Case to a New ALJ

The Complainant's Brief requested "the Administrator direct that this matter be reassigned to another ALJ because the ALJ's June 3, 2016 Sanctions Order clearly indicates that the ALJ has prejudged the credibility of the FAA's witnesses and reliability of the evidence without hearing testimony from the investigating ASI or Dr. Long or holding an evidentiary hearing."[36] However, such relief is not specified in § 13.219 as a permissible basis for an interlocutory appeal from an ALJ's order.[37] Moreover, applicable procedural regulations provide that the ALJ *sua sponte* may disqualify herself if she deems it appropriate, or a party may file a well-

[34] The original scheduling order had set a deadline of June 19, 2015, for the parties to "issue subpoenas and/or mutually arrange for depositions of witnesses and experts as may be necessary." (Original Scheduling Order, dated April 7, 2015, at 3, ¶ 8.) The amended scheduling order in this case did not set a deadline for serving subpoenas.

[35] Complainant's Brief in Support of Interlocutory Appeal of Right, at 9; Order *passim*.

[36] Complainant's Brief at 12.

[37] *See also* 14 C.F.R. § 13.233(j) (relating to appeals from initial decisions).

considered motion with the ALJ.[38] Neither of these procedures has been exhausted and, thus, it is premature to direct that this matter be reassigned to another ALJ.

E. Further Proceedings and Internal Investigation

Some of the alleged conduct underlying the ALJ's order, in particular, the non-retention of documents, may warrant a sanction of some type depending on findings made on an appropriate record after a hearing. It is not enough to respond to discovery in a timely fashion as articulated in a scheduling order; discovery responses must be complete and potential documentary evidence and witness testimony must not be destroyed or misplaced, even before the formal initiation of the civil penalty enforcement process with the Agency's issuance of the Notice of Proposed Civil Penalty. The record on this point and on whether the value of a witness was destroyed by interaction with the investigator needs to be further developed.

Indeed, as recognized by Complainant's Brief in Support of Interlocutory Appeal of Right:

> As an initial matter, Complainant emphasizes that by seeking this interlocutory appeal it is not suggesting that it condones alleged overzealous investigatory conduct by its investigative personnel or the failure to retain records related to a pending investigation in accordance with published guidance applicable to investigative personnel.

Complainant's Brief at 6. Allegations of (1) overzealous investigatory conduct by Agency investigative personnel, (2) failure to retain records related to a pending investigation in accordance with published guidance applicable to investigative personnel, and (3) improper contact between an attorney and potential witnesses are serious matters. Accordingly, at the request of the Chief Counsel, I have instructed the Agency's Office of Audit and Evaluation at the conclusion of this matter to conduct a thorough and prompt review of both the Inspector's and Counsel's handling of this matter and to report to me the results of such review.[39]

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[38] 14 C.F.R. §§ 13.205(c) and 13.218(f)(6).

[39] Among other things, the internal review will assess whether the Inspector followed the internal requirements of FAA Order 2150.3B regarding the assembling of evidence and tracking of information during the investigation stage (see chapters 4, 8, and 9) and whether the requirements of the Order are adequate to ensure necessary preservation of documents and other evidence in anticipation of likely enforcement litigation.

III. CONCLUSION

Based upon the foregoing, the ALJ's Order striking allegations from the Complaint and barring Complainant from introducing evidence at a hearing regarding those allegations is reversed and vacated as not supported by the preponderance of the reliable, probative and substantial evidence. The case is remanded to the ALJ for further proceedings consistent with this Decision.[40] The request that the case be re-assigned to another ALJ is denied.

Original signed by Michael P. Huerta

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[40] This is an interlocutory decision. It will become appealable upon issuance of the final order in this case.