UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: NANCY RENE FLOYD
FAA Order No. 2006-4

Docket No. CP02NM0007

Served: February 10, 2006

DECISION AND ORDER[1]

Nancy Rene Floyd has appealed from the initial decision of Administrative Law Judge Burton S. Kolko, denying her application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, for an award of attorney's fees and expenses.[2] Floyd incurred these costs while defending against a civil penalty action in which the FAA alleged that Floyd tendered a loaded firearm in her checked baggage for transport aboard an Air Wisconsin flight in violation of 14 C.F.R. § 108.11(c)[3]. The ALJ ruled that because of

[1] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/. In addition, Clark Boardman Callaghan publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

[2] A copy of the ALJ's written initial decision in the EAJA matter, dated September 30, 2004, is attached. (The initial decision is not attached to the electronic versions of this decision and is not included on the FAA website.)

[3] When this incident occurred, 14 C.F.R. § 108.11(c) provided as follows:

> No certificate holder may knowingly permit any person to transport, *nor may any person transport or tender for transport, … a loaded firearm in checked baggage aboard an airplane*. For the purpose of this section, a loaded firearm means a firearm which has a live round of ammunition, cartridge, detonator, or powder in the chamber or in a clip, magazine or cylinder inserted in it.

(Emphasis added.) Section 108.11(c) is no longer in effect. Part 108 was deleted from title 14 of the Code of Federal Regulations and rendered obsolete by the Aviation and Transportation Security Act, P.L. 107-71 (November 19, 2001), which transferred regulations concerning civil

conflicting evidence regarding the circumstances surrounding Floyd's disclosure that she had a loaded gun in her suitcase, the FAA failed to prove that Floyd had tendered a loaded firearm in checked baggage for transport aboard an air carrier. Consequently, the ALJ dismissed the complaint. The FAA appealed, but later withdrew its appeal.

Under the EAJA, a prevailing party is entitled to reimbursement of its attorney's fees and expenses unless the government's position was substantially justified. The question in this case is whether the FAA's position that Floyd had tendered her bags containing a loaded firearm was substantially justified. It is held in this decision that although the FAA failed to prove its case by the preponderance of the evidence, its position in the underlying case was substantially justified.

I. The Facts

Nancy Rene Floyd is an FBI special agent. On October 15, 2001, shortly after the September 11, 2001, attacks on the World Trade Center and the Pentagon, Floyd went to the Durango-La Plata County Airport, Durango, Colorado, intending to board an Air Wisconsin flight. Floyd presented her FBI credentials and identified herself as a Federal agent. She was carrying luggage, a purse, and two firearms, one of which had been in her vault for 8 years and which she now had to turn in to the FBI office at Denver. The FAA alleged that Floyd tendered that firearm in her checked luggage for transport aboard this flight in violation of Section 108.11(c) and sought a $700 civil penalty.

After a hearing at which the witnesses provided conflicting versions of what had happened, the ALJ found the following facts:

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aviation security from the FAA to the newly created Transportation Security Administration (TSA). 67 Fed Reg. 8340 (February 22, 2002). The prohibition against transporting or offering checked baggage containing loaded firearms is now at 49 C.F.R. § 1540.111(c)(1).

- When Floyd arrived at the ticket counter to check in for the flight, she immediately explained to ticket agent Margaret "Peggy" McDonald that she had *two* guns with her.[4]

- The computer determined that Floyd was a "selectee," and, as a result, Floyd was required to undergo special screening procedures.[5]

- Floyd was informed that she was a selectee and that her bags – which had remained at her side -- would be searched.

- When Floyd bent down to pick up her bags, she noticed a sign, affixed to the counter, which warned that loaded firearms in checked luggage are prohibited. As she began to hand over her bags, she questioned McDonald about the sign, even reading the sign verbatim to McDonald. After McDonald said that the sign was accurate, Floyd declared that there was a gun in one of her bags and she did not know whether it was loaded.

- Floyd also warned the security screener who conducted the dump-search that he would find a gun in the bag and that she did not know whether it was loaded.

- The security screener found a loaded revolver in one of the bags.

In reaching these facts, the ALJ found Floyd was a credible witness and that her "distinct recollection" of reading the sign to McDonald "tended not only to support her version of events but also her credibility in general." (Initial Decision at 3.) He accepted her testimony that her bags had remained at her side until taken from her to be searched.

While the ALJ found that the FAA witnesses were also credible, they were, he wrote, "either uncertain or actually supported" Floyd on the issue of whether she had tendered her bags. (*Id*.) He noted that McDonald had no specific recollection of where

[4] Floyd testified that when she arrived at the desk, she was carrying one gun on her hip and the other gun in her purse. She testified that McDonald asked her to put one of the guns in her luggage. McDonald denied that she (1) knew about the second gun,or (2) had requested that Floyd put the second gun in her luggage. The ALJ wrote in his initial decision: "[h]ow the revolver got in agent Floyd's bags is immaterial to the resolution of this case and so will not be decided." (Initial Decision at 2, n. 2.)

[5] Once a passenger has been identified as a selectee, the airline employees must verify that the passenger's luggage has been searched before they can assign a seat number. (Tr. 57.)

Floyd's bags were before the search, that she had speculated that Floyd's "luggage 'must have been' put up in the well to be checked (Tr. 28), and that she acknowledged that Floyd's luggage might have stayed on the floor next to her. (*Id*.)

The ALJ noted that Air Wisconsin Station Manager Stacy Bergl's testimony "was little more probative." (*Id*.) He noted that Bergl testified that she did not know where Floyd's bags were when Floyd was informed that she was a selectee (and after which Floyd announced that she had a possibly loaded gun in one of her bags.) The ALJ wrote "[i]n fact, she [Bergl] seemed to support Respondent's [Floyd's] position, stating that agent Floyd's bags at that moment had been 'still in her [Floyd's] control (Tr. 59)." (*Id*. at 4.) The ALJ characterized the screener's memory on the issue of where the bags were prior to the search as "hazy." (*Id*.)

The ALJ decided that luggage is "offered or tendered when it is placed in the 'bag well' – the little step, or raised-up area, by the ticket counter upon which would-be passengers typically place luggage to be tagged and placed on a conveyor belt for loading into the aircraft cargo hold." (*Id*. at 3.) As he wrote, both airline employees and prospective passengers understand "that control of luggage passes from the public to the air carrier" when luggage is placed in the bag well. (*Id*.) The ALJ wrote further that if a passenger declares that he has a weapon in a firearm before tendering the bags, then there is no violation of former Section 108.11.[6] (*Id*. at 2.)

The ALJ held that "[t]he agency … simply failed to show that Respondent's luggage had been 'offered' or tendered' under the FAR at any time before the bag search began for her possibly-loaded weapon." (*Id*. at 4.) The FAA's witnesses, he wrote:

[6] The ALJ wrote, "a declaration after tender is a violation of former §108.11(c); a declaration prior to tender is not." (Initial Decision at 2.)

"suggested that Floyd had declared the presence of a second revolver in her bags when the dump-search was about to begin, but its witnesses just could not reliably state where the luggage was at that moment." (*Id.*) He concluded that the evidence did not show that Floyd had tendered her bags before declaring that they contained a firearm. (*Id.*)

The FAA filed a notice of appeal of the initial decision, but later withdrew it.[7]

II. The EAJA Action

As the prevailing party, Floyd applied for attorney's fees and other expenses under the EAJA. The FAA opposed the application. After reviewing the documents submitted by both parties, the ALJ issued a written initial decision, denying Floyd's EAJA application.[8] The issue, the ALJ explained, was whether the agency had been substantially justified in bringing and pursuing the action.

Although the ALJ held in the underlying case that the FAA failed to prove that Floyd tendered her luggage, he held in his EAJA decision that the FAA's "position in the underlying case had been reasonably based both in law and fact" and that "the facts adduced and violations charged were reasonably connected." (EAJA I.D. at 3.) He wrote that "[a]n inquiry into the nature and quality of the evidence as a whole demonstrates that the agency had a reasonable basis for proceeding at all stages of the action." (*Id.*) He found that there was "enough evidence tending to show that agent Floyd in fact had tendered the second firearm … to warrant a conclusion that to bring and to continue the action was reasonable in both fact and law." (*Id.* at 3.)

[7] The Administrator dismissed the case after the FAA withdrew its notice of appeal. In the Matter of Floyd, FAA Order No. 2003-12 (October 6, 2003). Due to the separation of functions in these cases, the Administrator does not know why the agency attorney decided not to pursue the appeal.

[8] This decision, resolving the EAJA application, shall be cited as the "EAJA I.D."

The ALJ based his finding of substantial justification on McDonald's testimony that it was her usual practice to have passengers place their luggage in the bag well for tagging. He found that her testimony "raised an inference that Floyd had tendered her luggage prior to declaring her weapon." (*Id*., at 3-4). He held further that the following evidence provided by Bergl, Brockus, and McConkey supported a finding that the FAA was substantially justified:

- Bergl's post-incident statement, in which she wrote that she heard Floyd say that there was a gun in her bag only after the screener picked it up;
- Brockus's testimony that he heard Floyd declare the presence of her gun after he saw someone pick up her bag;
- McConkey's testimony that during a pre-hearing telephone conversation with Floyd, Floyd said that she declared the gun only after she was told that her bag was going to be "dump-searched" "and after the bag was in the well."

(*Id*. at 4.)

The ALJ noted further that no one corroborated Floyd's claim that she declared that she had two guns or that she had a second gun in her luggage before she gave up control of her bags. *(Id.)* The ALJ also pointed to the fact that before the hearing Floyd had not specifically denied that she had tendered her luggage prior to her declaration concerning the second gun, and that her counsel had stated that she had admitted that she had tendered her luggage in his opening statement. (*Id.*)

According to the ALJ, while this evidence did tend to show that Floyd had tendered her luggage, it "was thrown open to doubt sufficiently" that it did not preponderate. "Nonetheless, the character of the evidence the agency advanced in support of its case, when duly evaluated in light of the record as a whole, was sufficiently

probative of the agency's desired outcome to warrant a conclusion that its actions throughout were objectively reasonable and justified." (*Id*. at 4-5.)

III. Discussion

The EAJA provides:

> An agency that conducts an adversary adjudication shall award to a prevailing party … fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer … finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).[9] Once, as in this case, it is established that the applicant is a prevailing party, the government bears the burden of proving that its position in the underlying litigation was substantially justified or that special circumstances existed.[10] Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005). "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1).

To prove that its position was substantially justified, the agency must demonstrate that its position was reasonable both in law and fact. 14 C.F.R. § 14.04(a); Frey v. CFTC, 931 F.2d 1171 (7th Cir. 1991); Natchez Coca-Cola Bottling Co., Inc. v. NLRB, 750 F.2d 1350 (5th Cir. 1985). As the Supreme Court explained in Pierce v. Underwood, 487 U.S. 552, 565 (1988), '"substantially justified' means 'justified to a degree that could satisfy a reasonable person,' or having a 'reasonable basis both in law and fact.'" Jones

[9] "A prevailing applicant may receive an award for attorney fees and other expenses incurred in connection with a proceeding … unless the position of the agency … was substantially justified." 14 C.F.R. § 14.04(a).

[10] The FAA's EAJA regulations specifically place the burden of proving that the agency's position was reasonable in fact and law on the agency. 14 C.F.R. § 14.04(a).

v. Lujan, 887 F.2d 1096, 1098 (D.C. Cir. 1989). The substantial justification standard "is satisfied if there is a 'genuine dispute,' or if reasonable people could differ as to the appropriateness of the contested action." Pierce v. Underwood, 487 U.S. at 565. "To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness." *Id*. at 566.

The government does not have to show that it had had a substantial likelihood of prevailing in the underlying case to prove that its position was substantially justified. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1231 n.4 (9th Cir. 1990); In the Matter of Wendt, FAA Order No. 1993-9 at 4 (March 25, 1993.) An agency's defeat in the underlying action on the merits does *not* raise a presumption that its position was not substantially justified under EAJA. S&H Riggers & Erectors v. OSHA, 672 F.2d 426, 430 (5th Cir. 1982); In the Matter of Kuhling, FAA Order No. 2005-13 at 10 (August 17, 2005). As explained in one recent case:

> Although the strength of the government's position in the litigation obviously plays an important role in a substantial justification evaluation, the reasonableness inquiry "may not be collapsed into [an] antecedent evaluation of the merits, for EAJA sets out a distinct legal standard." Cooper v. United States R.R. Ret. Bd., 24 F.3d 1414, 1416 (D.C. Cir. 1994) (internal quotation marks omitted). The statutory structure assumes that the government can lose on the merits and nevertheless be found to have taken a substantially justified position.

Taucher v. Brown-Hruska, 396 F.3d at 1173.

Consequently, the evidence in this case must be evaluated to determine whether the FAA had a reasonable basis in fact and law to pursue this action – to allege that Floyd had tendered a loaded firearm in her checked baggage for transport aboard an air carrier's airplane. Although there were conflicting versions of the incident, the substantial quality

of the evidence presented by the FAA showed that the FAA's position was substantially justified even though its evidence did not preponderate.

Preliminarily, it should be noted that Floyd admitted in her answer to the Complaint that she had tendered her luggage containing a loaded weapon.[11] Floyd's only defense initially was that she put the weapon in the luggage at the request of an airline employee.[12]

Contrary to the ALJ's finding in his initial decision on the merits that none of the FAA's witnesses recalled where Floyd's bags were prior to the search, the FAA did have evidence that Floyd's bags had been in the bag well before the search. Donald Brockus, the deputy director of aviation at the airport,[13] who arrived at the counter after the computer designated Floyd as a "selectee," testified that he observed the bags sitting in the bag well when he reached the counter. He testified further that he later saw someone behind the counter grab Floyd's bags out of the bag well. (Tr. 117, 119.)[14]

Also, ticket agent McDonald testified that the first thing that she normally does when a passenger comes to the counter is print out that passenger's tickets, and then ask the passenger if there is any luggage to check. (Tr. 29, 37). If the passenger has luggage

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[11] Floyd's attorney acknowledged the admission in his opening argument. (Tr. 18.)

[12] She responded: "Admitted so much of the allegation that Respondent in-checked baggage at Durango-LaPlata Airport, Durango, Colorado that contained a loaded revolver, but states that this was done at the direction of an airline employee at the ticket counter. Denied that the loaded gun was transported aboard said flight or any flight." Answer, ¶ 2, dated June 21, 2002. Further, her attorney acknowledged in his opening statement that "we have admitted that she was tendering or had tendered the baggage …," (although he also argued in that statement that Floyd did not complete the tendering process before she made the declaration, having only handed over one of her 2 pieces of luggage. (Tr. 17-18.)

[13] Brockus serves as the airport security coordinator. (Tr. 116.)

[14] Hence, there was a direct observation by a disinterested witness that Floyd had tendered her bags.

to check, then McDonald ordinarily asks the passenger to put the luggage in the bag well. (Tr. 38.) As the ALJ noted in his EAJA decision, this testimony raised the inference that McDonald followed her usual practice and asked Floyd to place her bags in the bag well. Alone, this inference may not have been sufficient to satisfy the EAJA's "substantially justified" test, but it is consistent with – and supports -- Brockus's testimony that he observed Floyd's bags sitting in the bag well.

Moreover, station manager Bergl's written statement (prepared on the same day as the incident) was consistent with Brockus's testimony. She wrote that security was paged to come to the ticket counter to dump search Floyd's "checked bags" and that Bergl subsequently informed Floyd that, as a selectee, "her checked luggage" had to be searched. (Exhibit C-1.) These, albeit conclusory, characterizations of the bags as "checked" suggest that the bags had been placed in the bag well where bags are tagged before the dump-search.

With Brockus's observation of the bags in the bag well, supported by McDonald's testimony about her usual practice and Bergl's description in her written statement of Floyd's luggage as "checked" before it was searched, the FAA was substantially justified in taking the position that the luggage had been placed in the bag well. Consequently, the agency was also substantially justified in concluding that Floyd had tendered her luggage for transport, even though the ALJ ultimately found that this evidence did not preponderate.

In addition to analyzing whether Floyd tendered her bags, the ALJ considered whether she had made a declaration concerning the possibility that her luggage contained a loaded gun before or after she "tendered" or "offered" her bags to the carrier. Although

the ALJ wrote that such a declaration after tender would be a violation of former Section 108.11(c), while a declaration before tender would not be, there is nothing in the regulation that makes such a distinction. It appears that the ALJ may have confused Section 108.11(c) pertaining to a *loaded* gun with Section 108.11(d) which addresses an *unloaded* gun. Under Section 108.11(d), it is a violation to tender for transport in checked baggage an unloaded firearm unless the passenger has declared the unloaded gun before checking the baggage. There is no similar provision applicable to loaded firearms under Section 108.11(c). Therefore, we do not need to resolve in this EAJA appeal the question whether the FAA was substantially justified as to that factual question.[15]

Accordingly, Floyd's appeal of the ALJ's decision denying her application for reimbursement of her attorney's fees and expenses is denied.[16]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

[15] Any arguments that the parties presented in their briefs that have not been addressed in this decision have been considered and have been rejected as either irrelevant or without merit.

[16] Under 14 C.F.R. § 14.29, the applicant may, within 30 days of the date of this decision, file a petition for review with the appropriate United States Court of Appeals.