UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: DOMINION CONCEPTS, INC.
FAA Order No. 2005-4

Docket No. CP02SO0042 (EAJA)
DMS No. FAA-2002-13912[1]

Served: March 10, 2005

DECISION AND ORDER[2]

Joseph D. Lonsford (Lonsford), trustee of Dominion Concepts, Inc. (Dominion), has appealed the administrative law judge's (ALJ's) decision[3] denying his application for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. On appeal, Lonsford argues that: (1) contrary to the FAA's argument, the EAJA applies to hazardous materials cases; (2) a consent order is a "decision of the adjudicative officer" under the EAJA; and (3) the FAA's demand substantially exceeded the ALJ's order and was unreasonable compared with it, and therefore, he is entitled to an award of attorney fees.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS) at the following Internet address: http://dms.dot.gov.

[2] 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/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

[3] A copy of the ALJ's written decision is attached. (The ALJ's decision is not attached to the electronic versions of this decision nor is it included on the FAA website.)

I. Case History

A. Underlying Civil Penalty Action

On January 25, 2002, the FAA filed a complaint alleging that on September 24, 1999, Dominion violated various hazardous materials regulations in 49 C.F.R. Parts 171 – 173 when it knowingly offered an undeclared shipment of hazardous materials for air transportation. The FAA further alleged that Dominion violated the hazardous materials regulations when it failed to class, describe, package, mark, label, and certify the materials properly, to provide emergency response information, and to instruct Dominion's officers, agents, and employees as to the applicable regulations.[4] The FAA sought a $27,000 civil penalty under 49 U.S.C. § 5123(a).

Dominion's trustee in bankruptcy, Joe D. Lonsford, filed a *pro se* motion to dismiss, arguing that Dominion was bankrupt and ceased to do business on September 30, 2001. The FAA objected, arguing that the fact that Dominion was bankrupt or had ceased operations was not a ground for dismissal. According to the FAA, the motion to dismiss was essentially a declaration of inability to pay the civil penalty, an affirmative defense that was not a proper ground for dismissal. The FAA argued that the ALJ still needed to determine the issue of liability, and the record contained no proof of inability to pay.

The ALJ held a pre-hearing telephone conference, at the end of which he ordered Lonsford, now represented by counsel, to file Dominion's financial statements, as well as proof that Dominion had been a corporation and that it had ceased to exist. Lonsford

[4] Specifically, the FAA alleged that Dominion violated 49 C.F.R. §§ 171.2(a); 172.200(a); 172.202(a)(1) – (5); 172.204(a) or (c)(1); 172.204(c)(2) & (3); 172.300(a); 172.301(a); 172.312(a)(2); 172.400; 172.404(a); 172.600; 172.602(b)(3); 172.604(a)(3); 173.1(b); 173.24(b)(1); and 173.203.

filed Dominion's financial statements, as well as a certificate of incorporation from the State of Texas dated December 9, 1999. Lonsford also filed a resolution signed by the officers of Dominion on June 14, 2001, stating that Dominion would cease and desist as a business on September 30, 2001, and that any required forms would be filed with the State of Texas.

The FAA and Lonsford filed a motion requesting that the ALJ issue a consent order assessing a $1,000 civil penalty against Dominion and dismissing the complaint with prejudice. The ALJ granted the motion.

B. Attorney Fee Action

Subsequently, Lonsford filed an application seeking $10,000 in attorney fees and expenses under the EAJA. Lonsford argued that Section 504(a)(4) of the EAJA entitled him to attorney fees. Section 504(a)(4) provides that:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

5 U.S.C. § 504(a)(4). Lonsford pointed out that the agency's demand of $27,000 substantially exceeded the $1,000 in the ALJ's consent order, and argued that the agency's demand was unreasonable when compared to the consent order, under the facts and circumstances of the case.

The FAA filed a motion to dismiss, arguing that the EAJA does not apply to hazardous materials cases, and even if it did, the FAA's position was substantially

justified. In reply, Lonsford argued that the EAJA did indeed apply to cases under the hazardous materials statute, and that it was irrelevant whether the agency's position was substantially justified, because he filed his application under the above-quoted Section 504(a)(4), which does not foreclose an award of attorney fees if the agency's position was substantially justified, in contrast to Section 504(a)(1), which provides that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that *the position of the agency was substantially justified* or that special circumstances make an award unjust.[5]

5 U.S.C. § 504(a)(1) (emphasis added).

The ALJ dismissed the application on the ground that his consent order was not a "decision of the adjudicative officer" within the meaning of the EAJA. He reasoned that the term "decision" meant a decision issued after consideration of the facts and the law, and so was distinguishable from a consent order. The ALJ relied upon Section 13.223 of the FAA's Rules of Practice, which provides that the ALJ will issue an initial decision only if the reliable, probative, and substantial evidence in the record supports the decision. 14 C.F.R. § 13.223. The ALJ did not address the other issues raised by the parties. Lonsford filed a timely notice of appeal, which he perfected by filing a timely appeal brief.[6] The FAA has not filed a reply brief.

[5]Lonsford concedes that he was not the prevailing party and does not base his application on this provision.

[6] Lonsford has requested oral argument under 14 C.F.R. § 13.233(h). Oral argument is unnecessary in this case, and the request is denied.

II. Discussion

A. Applicability of EAJA

The EAJA does not apply to hazardous materials cases. It applies only to adversary adjudications[7] where the implementing statute requires that the matter be decided after a *hearing on the record*. The EAJA defines "adversary adjudication" in relevant part as "an adjudication *under section 554* of this title [the Administrative Procedures Act or APA] …." 5 U.S.C. § 504(b)(1)(C) (emphasis added). Section 554 of the APA "applies … in every case of adjudication *required by statute* to be determined *on the record* after opportunity for an agency hearing …." 5 U.S.C. § 554(a) (emphasis added). The courts have held that:

> a section 554 hearing includes the following procedural protections: an impartial and unbiased presiding officer, notice and opportunity to participate in the hearing, the right of parties to appear with counsel, the right to present oral and written evidence (including rebuttal evidence) and to conduct such cross-examination as is required for a full and true disclosure of the facts, the right to submit proposed findings, conclusions, and exceptions, the compilation of an exclusive record upon which the agency must base its decision, and limitations on *ex parte* communications and on the combination of prosecutorial and adjudicative functions.

Friends of the Earth v. Reilly, 966 F.2d 690, 693 n.4 (D.C. Cir. 1992), citing St. Louis Fuel and Supply Co., Inc. v. Federal Energy Regulatory Commission, 890 F.2d 446, 448 (D.C. Cir. 1989).

According to the Supreme Court, the EAJA applies only where Congress has clearly expressed its intent that proceedings be governed by the APA. Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135-136 (1991). The hazardous materials statute does not clearly express such an intent. Instead, the statute provides that the government may assess a civil penalty for violations of the hazardous materials

[7] *See* 5 U.S.C. § 504(a)(1) and (4) (both referring to adversary adjudications).

regulations after only "notice and an opportunity for a hearing." 49 U.S.C. § 5123(b). Notice and an opportunity for a hearing – without the requirement that it be on the record – is significantly less than what APA Section 554 requires.

In Friends of the Earth, 966 F.2d at 692, the court noted that the statute at issue in that case "requires only a 'public hearing'; it does not expressly require either that the hearing be 'subject to section 554' or that the hearing be 'on the record.'" *Id.* at 693. The court noted that even though the absence of any "magic words" was not dispositive, "[w]hat counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural requirements." *Id*. at 693 (quoting St. Louis Fuel and Supply, 890 F.2d 446 at 448-449 (emphasis in original)). The court concluded that the EAJA did not apply. The court came to the same conclusion in St. Louis Fuel, stating that the "opportunity for a hearing" and limited statutory procedures required by the statute in that case, were "something less than APA section 554 mandates." *Id*. at 449.

Further, where Congress expressly invokes the APA in one part of a statute, the absence of any reference to Section 554 in the statute's hearing provision indicates that Congress intentionally rejected any requirement that the APA govern the hearings. Friends, 996 F.2d at 694 (citing St. Louis Fuel 890 F.2d at 448). In the instant case, Congress expressly invoked the APA in another portion of the hazardous materials statute *(see* 49 U.S.C. § 5103(b)(2), providing that proceedings to prescribe hazardous materials regulations must be conducted under APA Section 553), but Congress did not invoke the APA in the hearing provision.

Lonsford does not argue that the hazardous materials statute alone shows an intent on Congress' part to subject hearings to the APA. Instead, he argues that the FAA's authority to regulate the transportation of hazardous material by air does not derive solely from the hazardous materials statute, 49 U.S.C. §§ 5101 - 5127, but also from the FAA's general statute, which provides that: "(1) the Secretary has the same authority [delegated to the Administrator[8]] to regulate the transportation of hazardous material by air that the Secretary has under section 5103 [of the hazardous materials statute]";[9] and (2) "the Administrator may impose a penalty on a person … only after notice and an opportunity for a hearing on the record."[10]

The only statute cited in the FAA's complaint was the hazardous materials statute, which does not require a hearing on the record. Specifically, the complaint alleged that Dominion was subject to a civil penalty under 49 U.S.C. § 5123(a) of the hazardous materials statute. The FAA did not allege in the complaint that it was bringing action under the FAA's general statute.

Even if the FAA's authority to impose civil penalties in hazardous materials cases derived from both the FAA's general statute and the more specific hazardous materials statute, there is a conflict in the statutes, as the general statute requires hearings to be held on the record, and the more specific statute does not. The Supreme Court has stated that "it is a commonplace of statutory construction that the specific governs the general." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992). Here, the general

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[8] 49 C.F.R. § 1.47(k).

[9] 49 U.S.C. § 40113(b).

[10] 49 U.S.C. § 46301(d)(7).

statute must yield to the statute dealing specifically with the transportation of hazardous materials, particularly when there is a presumption against waivers of sovereign immunity,[11] and the courts strictly construe such waivers.[12] Applying the EAJA to cases arising under the hazardous materials statute would contravene Congress's intent.

B. Reasonableness of FAA's Demand

Even if the EAJA did apply to hazardous materials cases, Lonsford's application for fees would still fail. The provision in the EAJA on which Lonsford bases his application for fees provides in relevant part that "[i]f … the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party … fees and other expenses …." 5 U.S.C. § 504(a)(4). Lonsford argues that the FAA's demand in the complaint for a $27,000 civil penalty was unreasonable, and that the FAA only accepted a $1,000 civil penalty because it realized it had brought its action against a non-existent entity. Lonsford notes that the FAA agreed to the $1,000 civil penalty 2 weeks after he provided the FAA with proof that the party named in the complaint, Dominion Concepts, was not incorporated until several months after the violations occurred.[13]

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[11] Friends, 966 F.2d at 696.

[12] *See, e.g.*, Escobar v. United States, 935 F.2d 650, 653 (4th Cir. 1991) (courts strictly construe EAJA in government's favor because EAJA's fee-shifting provisions are waiver of sovereign immunity) and Nichols v. Pierce, 740 F.2d 1249, 1257 ("doubts about the scope of a waiver [of sovereign immunity] should be resolved in favor of the narrower governmental liability").

[13] According to Exhibit 1 attached to Lonsford's supplement to his motion to dismiss, the incorporators were Joe and Carolyn Lonsford, both residing at the same address. In addition to serving as the incorporators, Joe and Carolyn Lonsford were the sole directors of the corporation, and Joe Lonsford was the corporation's agent.

There are several problems with Lonsford's argument. The EAJA statute first requires a determination that the demand was "substantially in excess" of the decision of the adjudicative officer. Assuming, *arguendo*, that a consent order is a decision of the adjudicative officer for EAJA purposes, and further assuming, without deciding, that the demand substantially exceeded the ALJ's decision, Lonsford must still show that the demand was unreasonable under all of the facts and circumstances of the case. This he cannot do.

Arguably, by entering into the consent order assessing a $1,000 civil penalty against Dominion Concepts, Inc., Lonsford waived any argument that the FAA brought action against the wrong party. Further, by Lonsford's own admission, it was not until shortly before the parties agreed to the consent order that he provided the FAA with proof that Dominion Concepts was unincorporated at the time of the violations (assuming, *arguendo,* that this made any difference). Likewise, and perhaps more importantly, Lonsford did not provide the FAA with proof of Dominion's financial difficulties until shortly before the parties agreed to the consent order.[14] Thus, at the time the FAA filed the complaint, the FAA's demand of $27,000, which was entirely consistent with the statute, regulations, and sanction guidance,[15] was reasonable. Once the FAA received

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[14] The only reason the FAA asserts for its agreeing to the $1,000 civil penalty is Lonsford's proof of Dominion's financial difficulties.

[15] The statute provides for a penalty of at least $250 but no more than $25,000 per violation. 49 U.S.C. § 5123(a). The inflation adjustment law (28 U.S.C. § 2641 (note), as amended by Public Law 104-134, April 26, 1996) and implementing regulations (14 C.F.R. § 13, Subpart H) increased the maximum to $27,500. The FAA's sanction guidance is located at 64 Fed. Reg. 19443 (April 21, 1999) ("Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines"). Per the sanction guidance, the FAA considered the criteria in 49 U.S.C. § 5123(a) and 14 C.F.R. § 13.16(a)(4) – *i.e.*, what the evidence showed about the nature, circumstances, extent, and gravity of the violation, the violator's degree of culpability, any history of past violations, ability to pay, effect on ability to do business, and other matters as justice requires. *Id*. at 19445. According to the complaint, there

proof of Dominion's financial difficulties,[16] the FAA agreed to a much smaller civil penalty.[17] Agreeing to the $1,000 civil penalty, as reflected in the ALJ's consent order, did not mean that the FAA's initial demand was unreasonable – to the contrary.

Further, one of the critical circumstances of this case is the parties' settlement of the case through a jointly proposed consent order prior to a hearing. Permitting a party to use post-dismissal EAJA litigation to thwart the balance struck by the parties in settlement would undermine the broad public policy that encourages compromise and settlement. Although the EAJA does not expressly bar claims following a settlement, it

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were seven violations – the failure to provide shipping papers, labels, markings, proper packaging, emergency response information, and training, as well as release into the environment (the package leaked). The FAA determined that the violations overall were of moderate weight, even though: (1) one of the materials, according to the complaint, was in hazard class 2.1, packing group III – a Category A material, violations concerning which are of maximum weight (*id*. at 19449); and (2) the shipment contained multiple hazardous materials, a potentially aggravating factor (*id*. at 19446). At the same time, there were counterbalancing factors – (1) the package did not exceed the authorized quantity limitations; (2) there were not multiple packages; (3) Dominion was not the manufacturer of the materials; and (4) Dominion apparently did not have a history of previous hazardous materials violations. Based on all of these factors, it was not unreasonable for the FAA to determine that the violations were of moderate weight.

Under the sanction guidance, Dominion was a "business entity," the definition of which includes businesses, corporations, sole proprietors, individuals offering hazardous materials in the course of their self-owned businesses, and *any* type of commercial entity. *Id*. at 19448. The matrix in the sanction guidance indicates that for each of the seven violations alleged in the complaint, a business entity is subject to a civil penalty between $1,500 and $7,500 (note that the midpoint is $4,500). *Id*. at 19447. The FAA selected an overall civil penalty of $27,000, which is roughly $3,857 per violation. While a determination of the appropriate penalty does not involve a simple mathematical formula (In the Matter of ICC, FAA Order No. 2002-29 at 15 (December 6, 2002)), but instead requires the exercise of discretion and judgment, the FAA's demand was within the moderate range, and under all the facts and circumstances of the case, as described above and known by the FAA at the time it filed the complaint, was consistent with the statute, regulations, and sanction guidance.

[16] As the FAA points out, the party claiming the affirmative defense of financial hardship bears the burden of proving it. In the Matter of Scenic Mountain Air, FAA Order No. 2001-5 at 13 (May 16, 2001).

[17] Any arguments not discussed have been considered and rejected.

would appear that such claims can succeed only under the most unusual circumstances.[18] Such unusual circumstances are not present here, and consequently, Lonsford's EAJA claim must be rejected.

For the foregoing reasons, this decision affirms the ALJ's dismissal of the application for attorney fees and expenses.[19]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of March, 2005.

[18] Although there is no doubt as to the proper resolution of this appeal, it would have been preferable for the parties to cover the matter of attorney fees in the consent order.

[19] Lonsford may, within 30 days of this determination, file an appeal with an appropriate United States Court of Appeals. 5 U.S.C. § 504(c)(2); 14 C.F.R. § 14.29.