UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: DELAWARE SKYWAYS, LLC
FAA Order No. 2005-5

Docket No. CP02EA0042
DMS No. FAA-2002-14059[1]

Served: March 10, 2005

DECISION AND ORDER[2]

Respondent Delaware Skyways, LLC (Delaware), has appealed the decision of Administrative Law Judge (ALJ) Burton S. Kolko.[3] Judge Kolko granted Complainant Federal Aviation Administration's (FAA's) motion for decision and assessed Delaware a $5,400 civil penalty for violating 14 C.F.R. § 91.207(c)(2)[4] by operating its aircraft on

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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.)

[4] 14 C.F.R. § 91.207 provides as follows:

> (a) [N]o person may operate a U.S.-registered airplane unless—
> …
> (c) Batteries used in the emergency locator transmitters required by paragraphs (a) and (b) of this section must be replaced …
> (2) When 50 percent of their useful life … has expired, as established by the transmitter manufacturer under its approval.
> The new expiration date for replacing … the battery must be legibly marked on the outside of the transmitter and entered in the aircraft maintenance record….

multiple flights with an overdue Emergency Locator Transmitter (ELT) battery. On appeal, Delaware contends that the ALJ erred in: (1) failing to find that it reasonably relied on the FAA inspector's purported promise not to bring enforcement action; (2) failing to find that the aircraft was airworthy; and (3) granting Complainant's motion for decision. This decision denies Delaware's appeal and affirms the ALJ's assessment of a $5,400 civil penalty.

I. Facts

Delaware, a flight school, is the owner and operator of a Cessna 152 aircraft with registration number N49848. On or about April 24, 2000, Delaware entered in its maintenance log for the aircraft: "ELT [Emergency Locator Transmitter] Battery due June 2001." (Complainant's Motion for Decision, Exhibit A-1.) Additionally, Delaware's aircraft status sheet indicated that the ELT battery for N49848 was due for replacement on June 1, 2001. (Complainant's Motion for Decision, Exhibit A-2.)

On August 13, 2001, after an inspection, FAA Inspector Joseph Myers issued Delaware an aircraft condition notice (FAA Form 8620-1) advising Delaware that the ELT battery on N49848 was overdue for replacement. (Complainant's Motion for Decision, Exhibit A-4.) The aircraft log showed that Delaware had operated the aircraft with the overdue battery on nine flights in July 2001, starting on July 6 and continuing until July 21. (Complainant's Motion for Decision, Exhibit A-3.) Delaware replaced the ELT battery on August 17, 2001. (Complainant's Motion for Decision, Exhibit A-5 at 2.) It claimed that it did so after Inspector Myers purportedly advised that the FAA would take no enforcement action if the ELT battery was replaced.

II. Case History

On December 5, 2002, the FAA issued a complaint alleging that Delaware violated 14 C.F.R. § 91.207(c)(2)[5] by operating the aircraft with the overdue ELT battery. The complaint advised Delaware that 49 U.S.C. § 46301(a)(1) provides for a civil penalty not to exceed $1,100 for each violation, and that under the facts and circumstances of this case, a civil penalty of $5,400 was appropriate.

On December 30, 2002, Delaware filed an answer admitting that the maintenance record indicated that the ELT battery was due in June. Nevertheless, Delaware's answer stated that Delaware was unable to answer the allegations that: (1) it operated the aircraft with an overdue battery; and (2) that the battery was due for replacement in June 2001 "because the battery in question is not available for inspection as to the expiration date thereon." (Answer Section II, ¶¶ 2 and 3.) In addition, Delaware asserted an affirmative defense of "reasonable reliance" based on the inspector's alleged promise that if it remedied the problem, then the FAA would take no enforcement action.[6] (Answer, Affirmative Defenses, Section I, ¶¶ 2 and 3.) Delaware's answer also denied the appropriateness of assessing it a $5,400 civil penalty, asserting instead that the case should be dismissed and that Delaware should be awarded attorney fees and costs under the Equal Access to Justice Act (EAJA).

On March 7, 2003, Complainant filed a motion for decision under 14 C.F.R.

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[5] *See supra* note 4 for the text of the regulation.

[6] Delaware bore the burden of proving its affirmative defense. *See* 14 C.F.R. § 13.224(c) (a party asserting an affirmative defense has the burden of proving it). Delaware did not attach any evidence, such as an affidavit, to its response to Complainant's motion for decision to support its claim that the inspector promised not to take enforcement action against it.

§ 13.218(f)(5),[7] asserting that there was no genuine issue of material fact and that Complainant was entitled to a decision in its favor as a matter of law. Complainant argued that Delaware's answer did not raise any genuine issue of fact, because Delaware could not challenge the accuracy of its own maintenance records.

On March 12, 2003, the ALJ issued an order: (1) holding that Delaware's answer did not raise a material issue of fact requiring a hearing; and (2) granting Complainant's motion for decision, including the request for a $5,400 civil penalty. The ALJ stated that Delaware did not dispute the facts, and its only defense was essentially a claim of estoppel based on the inspector's alleged statement that no enforcement action would be taken. In rejecting Delaware's estoppel claim, the ALJ relied on cases holding that ordinarily estoppel requires a showing that the opposing party has made a definite misrepresentation of fact to another, has reason to believe the other will rely on it, and the other reasonably relied on it to its detriment. The ALJ noted further that estoppel against the government is far more difficult to obtain because strong policy considerations favor the enforcement of regulations and that many courts require a showing of "affirmative misconduct" by government officials before an estoppel claim can even be considered.

Delaware filed a timely appeal from the ALJ's order granting Complainant's

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[7] This regulation provides as follows:

> *Motion for decision*. A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

14 C.F.R. § 13.218(f)(5).

motion for decision.

III. Discussion

On appeal, Delaware argues that the ALJ erred in analyzing the case only in terms of estoppel and in failing to consider its argument that it reasonably relied on the FAA inspector's promise not to bring enforcement action if it corrected the problem. Delaware states: Judge Kolko "erred in confusing the [reasonable reliance] Doctrine with an Estoppel Doctrine, writing his entire opinion on the Estoppel issue, …." (Appeal Brief at 8.)

Delaware's contention that the "reasonable reliance doctrine" applies lacks merit. The only cases that Delaware cites for this proposition are fraud cases in which "reasonable reliance" is one element of the cause of action.[8] None of the cases on which Delaware relies establishes "reasonable reliance" either as a cause of action itself or as a separate defense. Consequently, to the extent Delaware's answer raised a colorable defense, that defense, as the ALJ properly concluded, was in the nature of estoppel.

Although reasonable reliance is an element of estoppel, it is not, as Delaware implicitly suggests, the only element. In Heckler v. Community Health Services of

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[8] In the first case cited by Delaware, AES Corp. v. Dow Chemical Co., 325 F.3d 174, 179 (3rd Cir. 2003), *cert. denied*, 124 S.Ct. 805 (2003), AES sued Dow for securities fraud. The court held that "[t]o state a valid claim for securities fraud under Rule 10b-5 a plaintiff must show that the defendant 'made a misstatement or an omission of a material fact (2) with scienter; (3) in connection with the purchase or the sale of a security; (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury.'" 325 F.3d at 178. Similarly, in Crevier v. Sullinger, 57 Fed. Appx. 319, 320 (9th Cir. 2003), the court stated that "[u]nder California law, fraud occurs when a party makes an intentional misstatement of a material fact that induces reasonable reliance." 57 Fed. Appx. at 320. Finally, in Rambus, Inc. v. Infineon Technologies AG, 318 F.3d 1081 (Fed. Cir. 2003), the court held that:

> To prove fraud in Virginia, a party must show by clear and convincing evidence: 1) a false representation (or omission in the face of a duty to disclose), 2) of a material fact, 3) made intentionally and knowingly, 4) with the intent to mislead, 5) with reasonable reliance by the misled party, and 6) resulting in damages to the misled party.

Id. at 1096.

Crawford County, 467 U.S. 51, (1954), the Court explained the elements of estoppel as follows:

> [T]he party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse," and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.

Id. at 60 (citations omitted). In addition, the court in Heckler held that an estoppel may not ordinarily be obtained against the Government because it would undermine the rule of law. The facts in Heckler, where the Court required a health services provider to return certain overpayments even though the provider had received assurance that the payments were proper, aptly illustrate this principle.

While the Supreme Court has not concluded that a party may never estop the Government, courts have refused to consider any claim of estoppel without a showing of "affirmative misconduct." Siu de Puerto Rico, Caribe Y Latino America v. Virgin Islands Port Authority, 42 F.3d 801, 803 (3rd Cir. 1994); United States v. Pepperman, 976 F.2d 123, 131 (3rd Cir. 1992); United States v. St. John's General Hospital, 875 F.2d 1064, 1069 (3rd Cir. 1989); United States v. Asmar, 827 F.2d 907 (3rd Cir. 1987).[9] In the present case, even assuming there was evidence of the inspector's alleged promise, Delaware failed to allege that it had relied on the statement of the inspector to its detriment, much less that there was any affirmative misconduct. Indeed, when it replaced the ELT battery, Delaware was simply fulfilling – albeit belatedly – its duty to comply with the regulation. It should be clear that such delayed correction of regulatory

[9] In explaining what constitutes affirmative misconduct, these courts have insisted that it is more than just negligence. Siu de Puerto Rico, 42. F.3d at 801; Pepperman, 976 F.2d at 131; *see also* In the Matter of Offshore Air, FAA Order No.2001-4, at 18 n.34 (May 16, 2001) ("negligent provision of incorrect information does not constitute affirmative misconduct").

deficiencies does not eliminate the underlying violation.[10]

As the courts have held, "summary judgment is appropriate in favor of the government if there is an insufficient showing for any of the estoppel elements." Michigan Express v. United States, 374 F.3d 424, 426 (6th Cir. 2004) (citing Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992). The ALJ correctly analyzed the law and did not err in granting Complainant's motion for decision.

Delaware also argues that until the inspector issued the aircraft condition notice, the aircraft was airworthy as a matter of law. This is irrelevant because Complainant did not allege that Delaware operated an unairworthy aircraft in violation of 14 C.F.R. § 91.7(a), but only that Delaware violated 14 C.F.R. § 91.207(c)(2) by operating an aircraft with an overdue ELT battery.

Delaware also argues that the ALJ erred in granting Complainant's motion for decision because there were genuine issues of material fact yet to be decided regarding whether Delaware's maintenance records, indicating that replacement of the ELT battery was overdue, were accurate. Delaware's conclusory suggestion – with no supporting evidence in the record – that its own maintenance records might not be accurate is not sufficient to raise a genuine dispute of material fact. Delaware's only "support" for its argument is that the battery in question is no longer available for inspection. The absence of evidence is not sufficient to raise a claim that there is a dispute of material fact. Moreover, in the absence of any countervailing evidence, Delaware's maintenance records must be deemed to be accurate.[11]

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[10] At most, prompt correction would be a mitigating factor in setting the sanction.

[11] Although Complainant asserts that maintenance records are required by regulation to be accurate, there is no specific regulation, applicable to this case, that expressly so provides. The

IV. Conclusion

For the foregoing reasons,[12] this decision denies Delaware's appeal and affirms the ALJ's assessment of a $5,400[13] civil penalty.[14]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of March, 2005.

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requirement for maintenance records to be accurate for aircraft like the one in the instant case is only implicit in the regulations. The requirement is made explicit in the case law, however. *See* In the Matter of Watts Agricultural Aviation, FAA Order No. 1991-8 at 15-16 (July 5, 1991), *review denied*, 977 F.2d 594 (D.C. Cir. 1992) (*quoted in* In the Matter of California Helitech, FAA Order No. 2000-18 at 12 n.20 (August 18, 2000) and In the Matter of General Aviation, FAA Order No. 1998-18 at 15 n.16 (October 9, 1998)).

[12] Any other arguments not addressed have been considered and rejected, and found unworthy of discussion.

[13] In its appeal brief, Delaware does not challenge the amount of the civil penalty, but only the finding of violation.

[14] Under the rules of practice, unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision is an order assessing civil penalty. 14 C.F.R. §§ 13.16(d)(4) and 13.233(j)(2).