UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: DAVID E. EVERSON,
d/b/a NORTH VALLEY HELICOPTERS, INC.
FAA Order No. 2004-5

Docket No. CP00WA0001 (EAJA)
DMS No. FAA-2000-7729[1]

Served: September 22, 2004

DECISION AND ORDER[2]

The Federal Aviation Administration (FAA) brought a $16,000 civil penalty action against David E. Everson (Everson), doing business as North Valley Helicopters, for violating the rules requiring air carriers to have programs in place to prevent drug and alcohol abuse by employees who perform safety-sensitive functions. Specifically, the FAA alleged in the complaint that Everson violated the following regulations:

1. 14 C.F.R. § 135.251(a),[3] by failing to test for drugs, as required by 14 C.F.R. Part 121, Appendix I, each employee who performed a safety-sensitive function;

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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] Section 135.251(a) stated: "Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix." Appendix I included requirements for pre-employment, periodic, and random drug testing of persons performing such safety-sensitive functions as flight crewmember duties. 14 C.F.R. Part 121, Appendix I, Sections III and V.

2. Part 121, Appendix I, Section IX.A.4(a)[4] (prior to the change effective September 19, 1994), by failing to submit an anti-drug program to the FAA not later than 480 days after the FAA issued him a Part 135 certificate;

3. Part 121, Appendix I, Section IX.A.4(a)[5] (prior to the change effective September 19, 1994), by failing to implement an anti-drug program for direct employees not later than 60 days after FAA approval of the anti-drug program;

4. 14 C.F.R. § 135.255(a),[6] by failing to test for alcohol each employee who performs a safety-sensitive function as listed in Part 121, Appendix J;

5. Part 121, Appendix J, VII.A.1(c),[7] by failing to submit an alcohol misuse prevention program certification statement to the FAA by July 1, 1995; and

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[4] This section provided:

> Each employer who holds a part 135 certificate and employs 10 or fewer employees who perform a function listed in section III of this appendix . . . shall submit an anti-drug program to the FAA ... not later than 480 days after December 21, 1998.

14 C.F.R. Part 121, Appendix I, Section IX.A.4(a). Section IX.A.(5) modified this requirement by providing at the time that:

> Each employer or operator, who becomes subject to the rule as a result of the FAA's issuance of a part 121 or part 135 certificate or as a result of beginning operations listed in § 135.1(c) shall submit an anti-drug plan to the FAA for approval .... For purposes of applicability timelines, the date that an employer becomes subject to the requirements of this appendix is substituted for December 21, 1998.

14 C.F.R. Part 121, Appendix I, Section IX.A.5 (1993).

[5] This section provided: "Each employer shall implement its anti-drug program for its direct employees not later than 60 days after approval of the anti-drug program by the FAA." 14 C.F.R. Part 121, Appendix I, Section IX.A.(4)a.

[6] Section 135.255(a) provided: "Each certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter. 14 C.F.R. § 135.255(a) (1994).

[7] Part 121, Appendix J, Section VII.A.1(c) (1995) provided:

Footnote continues on following page.

6. Part 121, Appendix J, VII.A.1(c)[8] by failing to implement an alcohol misuse prevention program by January 1, 1996.[9]

Administrative Law Judge (ALJ) Burton S. Kolko dismissed the FAA's complaint on the ground that Everson had not flown any air carrier operations during the relevant period.

As the prevailing party, Everson then applied under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the FAA implementing regulations in 14 C.F.R. Part 14, to recover his attorney fees and expenses, which total $20,000. The ALJ denied Everson's application for litigation costs on the ground that the FAA's case was substantially justified,[10] and Everson has appealed. This decision affirms the ALJ's denial of litigation costs.

I. Facts

The FAA issued Everson a single-pilot air carrier operating certificate under 14 C.F.R. Part 135 on January 24, 1994. (Tr. 49; Respondent's Exhibit 3.) In 1994,

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> Each employer that holds a part 135 certificate and directly employs 10 or fewer covered employees, and each operator as defined in 14 C.F.R. 135.1(c) shall submit a certification statement to the FAA by July 1, 1995.

[8] Part 121, Appendix J, Section VII.A.1(c) (1995) provided: "Each employer must implement an AMPP [alcohol misuse prevention program] ... on January 1, 1996."

[9] The FAA has since changed the drug and alcohol program requirements to eliminate the grace periods for the submission and implementation of the programs. For example, the regulations at the time of the alleged violations required employers with fewer than ten employees, like Everson, to submit anti-drug programs for approval *within 480 days after the FAA issued their Part 135 certificate*. In contrast, under the current regulations, applicants for Part 135 certificates must submit anti-drug programs *before beginning operations*. The FAA eliminated the grace period for new air carriers due to the wealth of published guidance that helps new air carriers establish their programs. 59 Fed. Reg. 42922, 42926 (August 19, 1994).

[10] Attached is the ALJ's decision denying Everson his attorney fees and expenses.

Everson flew a few air carrier flights in California for a television news station before losing his contract with the station. (Tr. 49.)

In July 1995, Everson moved to Hawaii to become Director of Maintenance for Rainbow Pacific Helicopters. The FAA does not dispute Everson's testimony that he did not fly any operations under his Part 135 certificate while he was in Hawaii. Everson flew only maintenance, ferry, aerial photography, flight instruction, and check flights, none of which requires a Part 135 certificate. (Tr. 57-58.)

Everson later decided to return to California to resume his air carrier operation. While he was still in Hawaii, he asked the FAA to inspect his operation. (Tr. 52.) During the inspection, the FAA found that Everson's operations specifications did not include a drug-testing program. (Tr. 53.) Everson questioned whether the regulations required drug and alcohol testing programs for his single-pilot air carrier operation, and FAA employees advised him that the regulations did. (Tr. 34; Respondent's Exhibit 1.) The FAA received Everson's drug and alcohol testing programs on February 12, 1997, and approved them on February 24, 1997. (Tr. 21, 22, 61.) Everson began implementing the programs on February 24, 1997. (Tr. 21-22.) The following month, Everson returned to California to resume his air carrier operation.

II. Underlying Civil Penalty Action

On December 5, 1997, the FAA issued Everson a notice of proposed civil penalty alleging that Everson violated the drug and alcohol program regulations. Subsequently, on March 29, 1999, the FAA issued a complaint alleging, among other things, that Everson failed to administer drug tests to his employees performing safety-sensitive

functions between July 1995 and February 12, 1997,[11] and that he failed to test these employees for alcohol between January 1, 1996, and February 12, 1997.[12] (Complaint § I, ¶¶ 12, 13.)[13]

Everson asked the ALJ to dismiss several of the alleged violations[14] under the "stale complaint rule" because the FAA filed its notice of proposed civil penalty on December 5, 1997, more than 2 years after Everson allegedly committed the violations. Under the "stale complaint rule," which operates as a statute of limitations, an agency attorney must file a notice of proposed civil penalty within 2 years of the alleged violation. 14 C.F.R. § 13.208(d). If the agency is late in filing the notice and lacks good cause for the delay, then the ALJ may dismiss the complaint or any part of it involving violations that occurred more than 2 years before the FAA issued the notice. 49 U.S.C. § 46301(d)(7)(C); 14 C.F.R. § 13.208(d).

The ALJ ruled that the alleged violations in this case were "continuing violations" and that they continued until Everson complied with the regulations. As a result, the ALJ declined to dismiss the complaint under the stale complaint rule, but he limited the

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[11] Under the FAA's theory of the case, the regulations required Everson to file his anti-drug plan not later than 480 days after January 24, 1994 [the date the FAA issued Everson's Part 135 certificate], or by May 19, 1995. In addition, the FAA argued, the regulations required Everson to implement his anti-drug program not later than 60 days after agency approval, or, [if the agency approved the plan immediately], no later than July 18, 1995.

[12] Under the FAA's theory of the case, 14 C.F.R. Part 121, Appendix J, Section VII.A.1(c) required Everson to submit an alcohol misuse prevention program certification statement by July 1, 1995, and to begin implementing it by January 1, 1996. (Initial Decision at 1-2.)

[13] Although the complaint stated that Everson began implementing his programs on February 12, 1997, an FAA inspector testified at the hearing that Everson began implementing his programs on February 24, 1997, the day the FAA approved them. (Tr. 22.)

[14] Specifically, those involving 14 C.F.R. §135.251(a); Part 121, Appendix I, Section IX.A.4(a); and Part 121, Appendix J, Section VII.A.1(c).

proceedings to events that occurred no more than 2 years before the FAA issued the notice of proposed civil penalty.[15]

Everson also argued before the ALJ that he could not have violated any of the air carrier regulations in 14 C.F.R. Part 135 because he did not fly any air carrier operations during the relevant period, given that he lost his contract with the television station in 1994 and later moved to Hawaii to work for another company. Everson pointed out that 14 C.F.R. § 135.241, the applicability section for the subpart containing the drug and alcohol program rules, stated that the rules in the subpart applied to "operations."[16] The FAA countered that the specific regulations at issue expressly referred to "each certificate holder," and because Everson held an air carrier certificate during the relevant period, he had indeed violated the regulations.

The ALJ decided the case in favor of Everson, ruling that because Everson had not flown any air carrier operations during the relevant period, the drug and alcohol program rules did not apply, and he dismissed the FAA's complaint. The FAA filed an

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[15] Thus, for the drug testing rules, the ALJ excluded the period between May 19, 1995 [the date the FAA alleged that Everson should have submitted his anti-drug program], and December 5, 1995 [the date 2 years before the FAA filed its notice of proposed civil penalty], for the alleged violation of failing to *submit* his anti-drug program. Regarding the alleged violation of failing to *implement* his anti-drug program, the ALJ excluded the period between July 18, 1995, and December 5, 1995 [again, 2 years before the FAA filed its notice of proposed civil penalty]. *See supra* note 11.

As for the alleged violations of the alcohol testing rules, the ALJ excluded the period between July 1, 1995 [the date the FAA alleged the regulations required Everson to submit his certification statement] and December 5, 1995 [2 years before the notice of proposed civil penalty]. The ALJ's limitation did not affect the alleged violation of the rule requiring Everson to implement the alcohol misuse prevention program by January 1, 1996, because this date was within 2 years of January 5, 1997 [the date the FAA filed its notice of proposed civil penalty]. *See supra* note 12.

[16] Section 135.241 provides: "[T]his subpart [containing the drug and alcohol program rules] prescribes . . . requirements for *operations* under this part (emphasis added)."

appeal from the ALJ's initial decision, but later withdrew it, leaving Everson as the prevailing party.

III. Attorney Fee Action

As the prevailing party, Everson applied to recover his attorney fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Under the FAA's rules implementing the EAJA, the agency must file an answer "within 30 days after service of an application." 14 C.F.R. § 14.22(a).

The FAA was late in filing its answer to Everson's application. In a petition for leave to file the answer late, the FAA stated that the answer was 3 days late "due to administrative errors," in that "the EAJA application was not discovered in [the FAA's] office until 2 days after it was due."

Everson argued that because the FAA's answer was late, the ALJ must award him litigation costs without deciding the merits of the EAJA application. The ALJ rejected this argument, ruling instead that he had discretion to accept the late answer. The ALJ explained that because the short delay did not prejudice Everson, he would accept the FAA's answer to Everson's application for attorney fees and expenses.

The ALJ also found that the FAA's case against Everson was substantially justified because the drug and alcohol program rules were ambiguous and the FAA's interpretation, that the rules applied to Everson due to his status as a certificate holder, was reasonable. The ALJ pointed out that in his decision in the underlying civil penalty case, he had warned that the reader should not infer that:

> no other outcome concerning the rules' meaning is possible . . . §§ 135.251 and 135.255 can reasonably be read to obligate aviation entities holding Part 135 certificates to execute anti-drug and alcohol

> misuse programs without regard to the operations they may actually undertake.

(EAJA Initial Decision at 3, quoting the Civil Penalty Initial Decision, dated June 16, 2000, at 6.) Having lost his EAJA case before the ALJ, Everson filed the instant appeal.

IV. Issues on Appeal

The central issues on appeal are:

- whether the ALJ erred in accepting the FAA's late answer to Everson's application for attorney fees and expenses; and
- whether the ALJ erred in finding the FAA's case substantially justified.

Regarding the issue of substantial justification, the sub-issues are:

- whether the FAA lacked substantial justification because its complaint was stale;
- whether the FAA lacked substantial justification in alleging that Everson violated the air carrier rules in 14 C.F.R. Part 135, given that Everson did not fly any air carrier operations under Part 135 during the period specified in the complaint; and
- whether the FAA lacked substantial justification because, according to Everson, the FAA intentionally misrepresented a material fact in its motion for decision.

V. Late Answer

Everson argues that the ALJ erred in accepting the FAA's late-filed answer to his application for attorney fees and expenses. In this regard, Everson points out that the FAA rules of practice for attorney fee cases provide in 14 C.F.R. § 14.21 that "any pleading . . . shall be filed . . . on all parties . . . *in the same manner* as other pleadings in the [underlying] proceeding . . . ." (Emphasis added). Everson contends that by virtue of this provision, Section 14.21, the rule for the underlying proceeding in 14 C.F.R. § 13.209(f) applies. Section 13.209(f) provides that "[a] person's failure to file an answer

without good cause shall be deemed an admission of the truth of each allegation contained in the complaint." According to Everson, under Section 13.209(f), the FAA consented to his application for fees by filing its answer late.

This argument is incorrect. Section 13.209(f) does not apply because it does not address the "*manner* of filing" within the meaning of Section 14.21. Section 13.209(f) is tellingly entitled "Failure to file answer," rather than "Manner of filing." It addresses the *consequences* of failing to file an answer. "Manner of filing" under Section 14.21 means matters such as how parties should send documents they wish to file to the hearing docket – for example, whether by personal delivery or by mail.

The general regulation for the underlying proceeding that deals with the manner of filing an answer is not Section 13.209(f), as Everson argues, but instead Section 13.209(b). Section 13.209(b), which is entitled in part "Filing," provides that "[a] person filing an answer shall personally deliver or mail the original and one copy of the answer for filing with the hearing docket clerk . . . ."

One clue that Section 13.209(f) does not apply to this case is that it expressly addresses the failure to file an answer to the *complaint*, and there is no complaint in attorney fee cases. Instead, there is an application for fees.

The FAA rules implementing the EAJA contain their own provision addressing the consequences of filing a late answer, making it both unnecessary and inappropriate to turn to the rules for the underlying proceeding. Section 14.22(a) of the EAJA rules provides that "failure to file an answer within the 30-day period *may* be treated as a consent to the award requested." Section 14.22(a) does not require a showing of good cause. By using the permissive term "may" rather than a mandatory term like "shall" or

"must," Section 14.22(a) permits ALJs to exercise their discretion in deciding whether to accept a late answer in attorney fee cases. Here, where there was no prejudice to Everson, the ALJ did not abuse his discretion in accepting the late answer under Section 14.22(a).

VI. Substantial Justification

A. In General

Under the Equal Access to Justice Act (EAJA), a prevailing party may recover reasonable litigation costs if the agency's position in the underlying litigation was not "substantially justified." 5 U.S.C. § 504(a)(1). The EAJA requires decisionmakers to use the administrative record as a whole to determine whether the agency's position was substantially justified. *Id.* Under the agency's rules implementing the EAJA, the agency attorney bears the burden of proving substantial justification. 14 C.F.R. § 14.04(a).

According to the U.S. Supreme Court, "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact." Immigration & Naturalization Service v. Jean, 496 U.S. 154, 158 n.6 (1990), citing Pierce v. Underwood, 487 U.S. 552, 565-566 (1988), *quoted in* In the Matter of Pacific Sky Supply, FAA Order No. 1995-18 at 5 (August 4, 1995). The Supreme Court has stated that "'[s]ubstantially justified' does not mean 'justified to a high degree,' but rather [the 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. 552, 565, *quoted in* Pacific Sky Supply, FAA Order No. 1995-18 at 5-6.

Failure to prevail does not raise a presumption of lack of substantial justification. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1231 n.4 (9th Cir. 1990); Pacific

Sky Supply, FAA Order No. 1995-18 at 11; In the Matter of Wendt, FAA Order No. 1993-9 at 3 (March 23, 1993). Even if the government loses, its position may have been substantially justified. The government need not even show that it had a substantial likelihood of prevailing to prove that its litigation position was substantially justified. Bay Area Peace Navy, 914 F.2d at 1230; Wendt, FAA Order No. 1993-9 at 4.

B. Stale Complaint

Everson argues that the ALJ erred in concluding that several of the alleged violations were continuing violations. He further argues that if they were not continuing, then all but two of the allegations in the complaint were stale.[17] Everson contends that because these allegations were stale, the FAA lacked substantial justification in bringing the case against him.

The FAA's governing statute does not address the issue. While it provides in 49 U.S.C. § 46301(a)(4) that "[a] separate violation occurs under this subsection for each day the violation continues . . . ," this provision does not address the circumstances under which a violation can be considered to continue.

According to Everson, the U.S. Court of Appeals for the Ninth Circuit resolved the issue of whether the violations in this case were continuing in United States v. Trident

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[17] There is no dispute that the following two allegations were timely: (1) that Everson violated 14 C.F.R. § 135.255(a) by failing to test for alcohol each of his employees who performed a safety-sensitive function in accordance with Appendix J; and (2) that he violated Part 121, Appendix J, VII.A.1(c) by failing to implement an alcohol misuse prevention program by January 1, 1996. The FAA filed its notice of proposed civil penalty on December 5, 1997, within 2 years after the deadline of January 1, 1996, contained in Part 121, Appendix J. *See supra* note 15.

Hence, the allegations that Everson contends were stale involved Everson's alleged lateness in submitting and implementing his drug-testing plan, as well as his alleged lateness in submitting the certification statement for his alcohol misuse prevention program.

Seafoods Corp., 60 F.3d 556 (9th Cir. 1995). Everson asserts that the FAA should not have initiated the instant case because Trident was binding on the FAA. He further asserts that by failing to follow binding precedent, the FAA was not substantially justified in bringing the case again him.

In the Trident case, Trident removed asbestos from its cannery without notifying the Environmental Protection Agency (EPA) beforehand. The EPA filed a civil penalty action against Trident, alleging, among other things, that by failing to notify the EPA of its intent to remove asbestos, Trident violated the Clean Air Act and implementing regulations. The EPA alleged that under 40 C.F.R. § 61.146(b)(4), Trident had to provide written notice to the EPA "as early as possible" of any plan to renovate a structure containing asbestos. The District Court agreed with the EPA and granted the agency's motion for summary judgment on the merits of this issue.

Regarding the civil penalty, Trident argued that the failure to notify the EPA was a single violation occurring on a single day, and therefore it was subject to a civil penalty for only one violation. The District Court rejected this argument, holding instead that Trident's violations extended from the date Trident reasonably should have given notice, which the court found was 10 days before the asbestos removal, to the date that government officials learned of the violation, 44 days later. Because the maximum civil penalty under the Clean Air Act was $25,000 "per day of violation," the district court found that Trident was subject to a potential civil penalty of $1,100,000. Due to mitigating factors, however, the court imposed the considerably smaller penalty of $64,750.

Trident then appealed its case to the Ninth Circuit. The court framed the issue on appeal as whether, for the purpose of determining the civil penalty, Trident's failure to notify the EPA was a one-time violation or a continuous violation. The court noted that the statute, regulations, and case law did not address the issue. In the court's view, because the statute and regulations were unclear, Trident's only obligation was to notify the EPA at some point before the renovation began. A reasonable interpretation, said the court, was that there was only one day of violation – the day before Trident began renovating. According to the court, the EPA had an obligation to state in the regulation either that the penalty is based on the length of time the violation exists, or that the duty to notify was continuous, if that was indeed what the agency intended.

Trident is distinguishable from the instant case. Once Trident had removed the asbestos, the violation was complete because the EPA could no longer monitor the removal to ensure safe practices in dealing with a dangerous material. The damage was already done. In contrast, the FAA regulations at issue in this case required air carriers to implement programs to ensure that air carrier employees do not abuse drug and alcohol while they perform safety-sensitive functions. The damage here was that air carrier employees could, on a continuing basis, abuse drugs or alcohol while performing safety-sensitive functions, and in doing so, endanger the safety of flight crews and passengers, as well as people on the ground. This damage continued until Everson complied with the regulations, making the alleged violations in this case continuous and the complaint timely.

A case cited by the FAA to support its contention that the violations were continuing, Administrator v. Jones, NTSB Order No. EA-3876 (1993), is also

distinguishable. In Jones, the FAA alleged that a pilot violated 14 C.F.R. § 61.51(d)(1), which provided that: "A pilot must present his logbook . . . for inspection upon reasonable request by the Administrator . . . ." The pilot, Jones, argued that the constitutional privilege against self-incrimination justified his refusal to present his logbook, as he was under investigation by the U.S. Customs Service and the Arkansas State Police for drug trafficking and other violations. The National Transportation Safety Board (NTSB) held that Jones' repeated refusal to present his logbook to the FAA for inspection constituted "*a continuing violation* of section 61.51(d) which [could not] be excused by his assertion of Fifth Amendment rights." (Emphasis added.)

It is true that the NTSB's decisions, though not binding in this forum, may be persuasive. Jones is distinguishable, though, because the regulation in Jones required the pilot to present his logbook *upon request*, and FAA inspectors made repeated, separate requests for Jones to present his logbook. In contrast, in the instant case, the regulations imposed requirements regardless of any requests from FAA inspectors.

Further, in Jones, the NTSB did not explain what it meant when it said that the violations in that case were continuing. It did not say whether it meant that the violations continued in the sense that Jones refused to present his logbook on more than one occasion, or whether they continued until Jones actually presented his logbook to the FAA.

No adjudicatory body has ruled yet on whether the pertinent violations of the FAA's drug and alcohol program rules are continuing violations or one-time only violations, and thus, this is a matter of first impression. The courts have based findings of substantial justification on the novelty of the issues and the fact that the case was one

of first impression. Health & Human Services of California v. U.S. Health & Human Services, 823 F.2d 323, 328 (9th Cir. 1987); *see also* Pacific Sky Supply, FAA Order No. 1995-18 at 10, citing Wendt, FAA Order No. 1993-9. In the instant case, given the novelty of the issues, the parties understandably have stretched to find cases that support their positions, even if the cases are not squarely on point. That there are cases supporting both positions, however, suggests a finding of substantial justification.

If, out of necessity, we are to extend our reach, as the parties have done, to cases that are similar but not squarely on point, there are additional cases that lend support to the FAA's position that the violations were continuing. For example, in one case, the court found a continuing violation where a man alleged that prison officials exposed him to the tobacco smoke and its attendant health-related danger over a period of time. Hill v. Prunty, 55 Fed. Appx. 418, 2003 WL 68088, 2003 U.S. App. LEXIS 342 (9th Cir. 2003). Similarly, in the instant case, the alleged violations involved exposing the public to danger over a period of time (that is, the danger that air carrier employees impaired by drugs or alcohol would perform safety-sensitive functions).

In another case, the court held that under the continuing violation doctrine, if a violation takes place within the limitations period and is related or similar to acts outside the limitations period, then all related acts, including the earlier acts, are actionable as part of a continuing violation. O'Loughlin v. County of Orange, 229 F.3d 871 (9th Cir. 2000). Arguably, the O'Loughlin case applies not just to acts but also to omissions, and suggests that the violations in this case, involving failing *each day* over the course of many months to submit and implement drug and alcohol programs, were continuing.

Another decision deals expressly with omissions. In Francis v. Health Care Capital, 933 F. Supp. 569 (E.D. La. 1996), the estate of a man who died after leaving a nursing home sued the nursing home for negligent care, including the failure to provide the man assistance with eating. In finding that the doctrine of continuing tort applied, the court stated that "the acts and/or *omissions* complained of did not abate until the decedent left the nursing home." *Id.* at 574; emphasis added. As a result, the court held, the statute of limitations did not bar the plaintiff's suit.

To return to the Trident case on which Everson relies, even if Trident were precisely on point, it is still unclear that it was binding on the FAA. Although the instant case arose in the same circuit as Trident, the FAA had no way of knowing when it initiated this case whether Everson would petition for review in the Ninth Circuit or in the D.C. Circuit, if at all. The FAA's rules of practice for attorney fee cases provide that:

> [an] applicant may . . . *appeal* the determination *to the court of the United States having jurisdiction to review the merits of the underlying decision* of the FAA adversary adjudication.

14 C.F.R. § 14.29 (emphasis added). In turn, the rules for the underlying proceeding provide in 14 C.F.R. § 13.235 that "[a] person may seek judicial review of a final decision and order of the Administrator as provided in section 1006 of the Federal Aviation Act of 1958, as amended." Section 1006(a), as amended, provides that:

> [A] person disclosing a substantial interest in an order issued by . . . the Administrator . . . may apply for review of the order by filing a petition for review in *the United States Court of Appeals for the District of Columbia Circuit* or in *the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.*

49 U.S.C. § 46110 (emphasis added). Thus, when this decision is issued, Everson may file an appeal not just with the Ninth Circuit, but also with the D.C. Circuit. Everson has

cited no case law from the D.C. Circuit holding that the type of violations in this case are one-time only rather than continuing violations. In summary, Trident is distinguishable and even if it were not, it would not bind the FAA.

Significantly, the FAA's position that the alleged violations were continuous was reasonable. There was no single harmful incident in this case. Each day that passes without an air carrier's drug and alcohol programs in place adds to the danger that air carrier employees will perform safety-sensitive functions while impaired by drugs or alcohol. To hold that violations of the drug and alcohol program rules occur on one particular date rather than continuing until the air carrier cures the breach could reduce an air carrier's incentive to comply with the regulations. Further, as one court has stated, "the Government's enforcement role requires that as between the opposing risks of taking too narrow or too broad a view of 'what it may prosecute,' it must in prudence choose the broad view, knowing that judicial review . . . stands guard against error in that choice, whereas an error in the opposite direction is not likely ever to be corrected." United States v. Paisley, 957 F.2d 1161, 1170 (4th Cir. 1992), *quoted in* Pacific Sky Supply, FAA Order No. 1995-18 at 12.

For all of these reasons, the FAA's position that the violations were continuing was reasonable and the FAA was substantially justified in filing the complaint.

C. Absence of Air Carrier Operations

Everson renews his argument that the FAA lacked substantial justification for alleging violations of the air carrier rules, given that he had not flown any air carrier operations during the relevant period. To support this argument, he relies on 14 C.F.R.

§ 135.241, the applicability section at the beginning of Subpart E of Part 135.[18] Section 135.241 provided: "[T]his subpart prescribes the flight crewmember requirements for *operations* under this part." 14 C.F.R. § 135.241 (emphasis added.)

Nevertheless, the ALJ did not err in finding substantial justification. The specific regulations that the FAA alleged Everson violated, which are quoted below, did indeed refer to "each certificate holder," making reasonable the argument that one who holds a certificate to operate as an air carrier must implement drug and alcohol programs, simply by virtue of holding the certificate, and regardless of the type of operations flown.

For example, Section 135.251, entitled "Testing for prohibited drugs," provided that: "(a) Each *certificate holder* or operator shall test each of its employees who performs a function listed in Appendix I to part 121 of this chapter in accordance with that appendix." 14 C.F.R. § 135.251 (emphasis added).

Further, Appendix I to 14 C.F.R. Part 121 provided that:

> Each employer who *holds a part 135 certificate* and employs 10 or fewer employees who perform a function listed in section III of this appendix . . . shall submit an anti-drug program to the FAA . . . . Each employer[19] shall implement its anti-drug program for its direct employees not later than 60 days after approval of the anti-drug program by the FAA.

14 C.F.R. Part 121, Appendix I, Section IX.A.(4)(a) (emphasis added).

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[18] Subpart E, entitled "Flight crewmember requirements," includes 14 C.F.R. §§ 135.241 through 135.255.

[19] The definition of "employer" in Appendix I includes "a part 135 certificate holder." 14 C.F.R. Part 121, Appendix I, Section III.

Section 135.255, entitled "Testing for alcohol," stated that "*[e]ach certificate holder* and[20] operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter." 14 C.F.R. § 135.255(a) (emphasis added).

Finally, Appendix J to 14 C.F.R. Part 121 provided that:

> Each employer that *holds a part 135 certificate* and directly employs ten or fewer covered employees . . . shall submit a certificate statement to the FAA by July 1, 1995. Each employer[21] must implement an AMPP [alcohol misuse prevention program] meeting the requirements of this appendix on January 1, 1996.

14 C.F.R. Part 121, Appendix J, Section VII.A.1(c) (emphasis added.) Given that these regulations refer to "each certificate holder," the FAA's argument that one who holds an air carrier certificate must implement drug and alcohol programs, regardless of the type of operations flown, was not unreasonable.

Furthermore, as the ALJ pointed out, certain statements in the regulatory history as well as other agency pronouncements arguably supported the agency's position. For example, the preamble to the final rule for alcohol programs stated that the rule would include "essentially the same classes of employers as are covered by the anti-drug rule: 14 CFR part 121 *certificate holders*, 14 CFR part 135 *certificate holders* . . . ." 59 Fed.

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[20] Everson might have argued that the use of the conjunctive "and" suggests that the regulation applies only if one is not just a certificate holder but also an "operator" – that is, one who is actually conducting operations. On the other hand, one can argue that the drafters did not intend this interpretation, given that the matching provision quoted above, Section 135.251, uses "or" instead of "and." The "and" may have simply been a drafting error. Also, a company ordinarily acquires a Part 135 certificate to conduct operations, which also suggests that the drafters were not addressing the specific issue in this case, where a company obtained a certificate but did not conduct operations under it for a period of time.

[21] As in Appendix I, the definition of "employer" in Appendix J includes "a part 135 certificate holder." 14 C.F.R. Part 121, Appendix J, Section I.D.

Reg. 7380, 7381 (February 15, 1994) (emphasis added). In addition, the FAA's guidelines for implementing anti-drug programs stated that: "[E]very single-person aviation business [under Part 135] . . . must be part of a drug program approved by the FAA." Office of Aviation Medicine, Drug Abatement Branch, "Guidelines for Single-Person Aviation Businesses: Implementing the FAA Anti-Drug Program," p. 3 (February 1990) (cited by the ALJ in his initial decision in the underlying civil penalty proceeding at p. 7).

Finally, the regulations required pre-employment drug and alcohol testing. 14 C.F.R. Part 121, Appendix I, Section V.A.; Appendix J, Section III.A. Pre-employment testing, for a new air carrier, obviously must take place before operations begin. Thus, the drafters could not have intended that the regulations require testing only during actual operations. Testing must also precede operations.

As the above discussion illustrates, there are reasonable arguments on both sides of the issue. Thus, the proper interpretation of the regulations was a valid issue for adjudication.

As discussed above, the FAA's argument did not have to win to be substantially justified. Bay Area Peace Navy, 914 F.2d at 1231 n.4. Indeed, the agency did not even need to show that it had a substantial likelihood of prevailing. *Id.* at 1230. Finally, quoting again from United States v. Paisley, 957 F.2d at 1170, "the Government's enforcement role requires that as between the opposing risks of taking too narrow or too broad a view of 'what it may prosecute,' it must in prudence choose the broad view, knowing that judicial review . . . stands guard against error in that choice, whereas an error in the opposite direction is not likely ever to be corrected."

For these reasons, the ALJ did not err in finding that the agency was substantially justified in alleging violations of the air carrier rules.

D. Intentional Misrepresentation

Everson argues in his appeal brief that agency counsel intentionally misrepresented a material fact in an attempt to perpetrate a fraud upon the ALJ, and therefore, the FAA lacked substantial justification. (Appeal Brief at 23.) It is true that in the FAA's motion for decision, agency counsel asserted that Everson's "pleadings, *answers to interrogatories, and admissions*" (emphasis added) demonstrated that there was no genuine issue of material fact, even though Everson had not filed any answers to interrogatories or admissions.

The record does not support a finding of intentional misrepresentation. It is far more likely, as FAA counsel suggests on appeal, that the error was inadvertent and that counsel representing the agency in the proceedings before the ALJ was using standard language, what is often called "boilerplate," and simply forgot to take out the inapplicable wording. The inadvertent error did not prejudice Everson, as the ALJ denied the FAA's motion for decision. For these reasons, the ALJ did not err in declining to find a lack of substantial justification due to intentional misrepresentation and attempted fraud.[22]

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

VII. Conclusion

For the foregoing reasons, this decision affirms the ALJ's denial of attorney fees and expenses.[23]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of September, 2004.

[23] Everson 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.