UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **PETER A. MARTIN and JAMES C. JAWORSKI**	FAA Order No. 98-19 Served: October 9, 1998 Docket No. CP97WP0041

DECISION AND ORDER[1]

Peter A. Martin and James C. Jaworski have appealed Administrative Law Judge Ann Z. Cook's denial of their application for attorney fees and expenses.[2] This decision affirms the law judge's denial of fees and expenses.

In the underlying civil penalty action,[3] the Federal Aviation Administration (FAA) alleged that on or about July 10, 1995, Martin and Jaworski violated 14 C.F.R. § 105.29[4] by parachuting through or too close to clouds. At the conclusion of the hearing, the law judge determined that the FAA had failed to prove the violations by a

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[1] The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 63 Fed. Reg. 37,914, 37,929 (July 14, 1998).

[2] A copy of the law judge's written initial decision denying fees and expenses is attached.

[3] Early in the proceedings, the law judge consolidated Martin and Jaworski's individual civil penalty actions into one.

[4] The text of the regulation is found in an addendum to this decision.

preponderance of the evidence. The FAA filed a notice of appeal from the law judge's decision, but withdrew its appeal 2 days before the deadline for perfecting the appeal.[5]

As the prevailing parties, Martin and Jaworski filed an application under 5 U.S.C. § 504, the Equal Access to Justice Act (EAJA), to recover their attorney fees and expenses. The law judge, however, denied the application on the ground that the FAA's position in the civil penalty action was substantially justified. (Initial Decision at 3.) In her initial decision, the law judge stated:

> Clearly, ... if the FAA did establish a prima facie case, as it did in this instance, the FAA's position was substantially justified. That is, at a minimum it was shown that there was a reasonable bases (sic) in fact and law as to the allegations contained in the Complaint, and that there was a connection between the facts and law which if not rebutted by the Respondents would constitute a violation. It is to Applicants' credit that they were able to prevail in the underlying case due to their probative testimony and generally credible demeanor. However, the FAA was entirely justified in its position in initiating the civil penalty actions.

(*Id.*) Martin and Jaworski filed the instant appeal from the law judge's decision.

On appeal, Martin and Jaworski argue as follows:

- The FAA violated Martin and Jaworski's due process rights by failing to investigate thoroughly.
- The FAA's main purpose was to shut down parachuting operations at the Dillingham airport in Hawaii.
- The law judge violated Martin and Jaworski's due process rights by not letting them respond to the FAA's answer to their application for fees.
- Even if the FAA's position was substantially justified, it must still pay the fees incurred after the agency withdrew its appeal because the FAA failed to notify Martin and Jaworski of its withdrawal.

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[5] To perfect an appeal, a party must file an appeal brief within 50 days of the initial decision. 14 C.F.R. § 13.233(c).

Whether the FAA violated Martin and Jaworski's due process rights by failing to investigate thoroughly.

Specifically, Martin and Jaworski argue that the FAA failed to interview witnesses and to gather evidence – *i.e.*, weather reports and the videotape Jaworski made of the jump. According to their testimony at the hearing, the FAA inspectors stopped their car near the drop zone (0.2 miles away) and personally witnessed the skydivers descending through clouds. Then they pulled their car up to the gate, stood at the drop zone, and when they looked up, they saw nothing but clouds. (Tr. 139.) As a result, the inspectors felt "absolutely sure" that the skydivers had jumped through clouds. (*Id.*) Immediately after the jump, the inspectors interviewed skydivers Jaworski and Bernard, as well as the pilot of the aircraft from which the skydivers jumped. (Tr. 27, 59, 60.) After obtaining Martin's name from the jump manifest, they interviewed Martin as well. (Tr. 59, 62.) Thus, the FAA inspectors did interview witnesses to the incident. Moreover, given the FAA inspectors' certainty that they saw the violations with their own eyes, it is not surprising that they did not attempt to locate further witnesses[6] or to obtain weather reports.

As for the videotape of the jump, which was filmed from a camera attached to Jaworski's helmet, the inspectors did view and consider the videotape as part of their investigation. (Tr. 63, 137-38.) They did not, however, consider it to be probative.[7] If

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[6] Note that Martin and Jaworski fail to identify the other witnesses they claim the inspectors should have interviewed, and fail to specify what the unnamed witnesses would have said that would have changed the inspector's minds about initiating the actions against Martin and Jaworski. (Appeal Brief at 10.)

[7] The inspectors indicated that they had serious questions about the authenticity of the videotape. According to their testimony, the videotape was out of their sight for at least 20 minutes, and

Martin and Jaworski believed the videotape would exonerate them, they could have subpoenaed it and introduced it at the hearing, but they failed to do so. Martin and Jaworski's argument that the FAA inspectors failed to investigate thoroughly is rejected.

Whether the FAA's purpose was to shut down parachute operations at the Dillingham airport in Hawaii.

Although Martin and Jaworski claim that agency counsel stated that the FAA's main purpose was to shut down the jumpers and the parachute operations at the Dillingham airport (Appeal Brief at 3), they fail to provide any supporting reference to evidence in the record, and none can be found.[8] Martin and Jaworski's argument regarding the FAA's alleged intent to shut down the operation is rejected because it lacks an evidentiary basis.[9]

Whether the law judge violated Martin and Jaworski's due process rights by failing to provide them an opportunity to reply to the FAA's answer to their application for fees.

Under the agency's rules implementing the EAJA, applicants may file a reply to the agency's answer to the application for fees within 15 days after service of the answer. 14 C.F.R. § 14.23.[10] Because the agency served its answer by mail, Martin and Jaworski

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although the inspectors testified that the skydivers they saw fall through the clouds were wearing long pants, one of the skydivers in the videotape was wearing shorts. (Tr. 137-38.)

[8] Note that the Rules of Practice require parties to refer specifically in their appeal briefs to evidence contained in the transcript. 14 C.F.R. § 13.233(d)(2).

[9] The inspectors did testify that the FAA had increased surveillance because the FAA's Honolulu office had received several complaints about safety violations by skydivers. (Tr. 16.) There is nothing improper about the increased surveillance, however. Indeed, given the agency's safety responsibilities, the FAA might have been remiss had it not done so.

[10] Section 14.23 provides as follows: "Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 14.26."

had 5 additional days to file a reply. (*See* 14 C.F.R. § 13.211(e), providing that "[w]henever a party has a right or duty to act or to make any response within a prescribed period after service by mail ... 5 days shall be added to the prescribed period.") In this case, the agency filed its answer to the application for fees on September 11, 1997. As a result, Martin and Jaworski had until October 1, 1997, to file a reply, but they failed to do so. A week later, on October 7, 1997, the law judge issued her initial decision denying the application for fees.

Thus, Martin and Jaworski's argument that they were not permitted an opportunity to reply to the agency's answer is without merit. Martin and Jaworski had the opportunity to reply but failed to avail themselves of it.

Whether the FAA must pay the fees incurred after the agency withdrew its appeal because the FAA failed to notify Martin and Jaworski of its withdrawal.

The FAA filed its "Motion to Withdraw Appeal" on July 8, 1997. The only work performed after July 8, 1997, for Martin and Jaworski was 2 hours of work preparing the application for fees itself. (Application for Payment of Fees and Expenses, Exhibit 3.) Martin and Jaworski are not entitled to an award of fees for the time spent preparing their application for fees because, as the law judge found, the agency's position was substantially justified. Nothing in Martin and Jaworski's appeal brief casts doubt on the law judge's finding of substantial justification. Moreover, the agency did in fact notify Martin and Jaworski of the withdrawal of its appeal. The certificates of service attached to the FAA's "Motion to Withdraw Appeal" indicate that the FAA served its motion on both Martin and Jaworski.[11]

[11] Even though the FAA served Martin and Jaworski personally, rather than their designated representative, Martin and Jaworski were still served. The designated representative did not

For all of these reasons, the law judge's order is affirmed. [12] Due to my affirmance of the law judge's denial of fees, there is no need to address Martin and Jaworski's claim that the law judge erred in concluding that the hourly rate Martin and Jaworski claimed for their representation was too high. (Appeal Brief at 15.)

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of October, 1998.

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appear at the hearing and did not serve a notice of representation until June 24, 1997. The Hearing Docket did not receive it until July 7, 1997.

[12] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1998).

ADDENDUM

14 C.F.R. § 105.29 provides as follows:

Flight visibility and clearance from clouds requirements. No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft –
(a) Into or through a cloud; or
(b) When the flight visibility is less, or at a distance from clouds that is less, than that prescribed in the following table:

Altitude	**Flight visibility (statute miles)**	**Distance from clouds**
(1) 1,200 feet or less above the surface regardless of the MSL altitude.	3	500 feet below. 1,000 feet above. 2,000 feet horizontal.
(2) More than 1,200 feet above the surface but less than 10,000 feet MSL.	3	500 feet below. 1,000 feet above. 2,000 feet horizontal.
(3) More than 1,200 feet above the surface and at or above 10,000 feet MSL.	5	1,000 feet below. 1,000 feet above. 1 mile horizontal.