Served: March 6, 2014

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MICHAEL P. HUERTA, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, Complainant, v. RAPHAEL PIRKER, Respondent.	*	Docket CP-217

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DECISIONAL ORDER

This matter is before the Board upon the Appeal of Raphael Pirker (herein Respondent), from an Order of Assessment, which seeks to assess Respondent a civil penalty in the sum of $10,000.00 U.S. dollars. The Order was issued against Respondent by the Administrator, Federal Aviation Administration (FAA), herein Complainant, and that Order, as provided by Board Rule, serves as the Complaint in this action.

The Complaint is comprised of eleven Numbered Paragraphs of allegations.[1] In the first paragraph, it is alleged that Respondent acted on or about October 17, 2011, as pilot in command of "a Ritewing Zephyr powered glider aircraft in the vicinity of the University of Virginia (UVA) Charlottesville, Virginia..." The next allegation Paragraph avers that that aircraft, "...is an Unmanned Aircraft System (UAS)..."[2] It is further alleged that Respondent's flight operation was for compensation, in that payment was received for video and photographs taken during that flight. As a consequence of those allegations, and the remaining factual allegations set forth in the Complaint, it is charged that Respondent acted in violation of the provisions of Part 91, Section 91.13(a), Federal Aviation Regulations (FARs).[3]

Respondent has filed a Motion to Dismiss, seeking dismissal upon the assertion that the Complaint is subject to dismissal, as a matter of law, in the absence of a valid rule for application of FAR regulatory authority over model aircraft flight operations.

Complainant has submitted a Response[4] in opposition, arguing that the Complaint is not deficient in that, as the non-moving Party, the allegations of the Complaint must be assumed true, and the Complaint evaluated in manner most favorable to Complainant. This argument is premature. Respondent's Motion does not challenge the sufficiency of the Complaint, and stipulates therein that, solely for purposes of his Motion, the Complaint's allegations are to be assumed as true. Any dispute and argument as to the efficacy of the Complaint must be deferred, pending resolution of the threshold issue of Complainant's authority to exercise FAR regulatory action over model aircraft operations.

14 C.F.R. Part 1, Section 1.1 states as the FAR definition of the term "Aircraft" a "...device that is used or intended to be used for flight in the air..." And Part 91, Section 91.1 states that Part, "...prescribes rules governing operation of aircraft..." Premised upon those FAR provisions and

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[1] See Attachment 1, Order of Assessment, for a full statement of the allegations.

[2] See Attachment 2 Specifications: Ritewing Zephyr 11.

[3] Part 91, Section 91.13(a) provides: No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[4] The Parties were granted leave to file supplemental Briefs, and all submissions have been considered.

those of 49 U.S.C. Section 40102(a)(6)[5], Complainant argues that Respondent was operating a device or contrivance designed for flight in the air and, therefore, subject to Complainant's regulatory authority. The term, "contrivance" is used in the 49 U.S.C. Section 40102(a)(6) definition, "aircraft", whereas Part 1, Section 1.1, defines an "aircraft" as a "device"; however, the terms are basically synonymous, as both refer to an apparatus intended or used for flight.[6]

It is argued by Complainant that, under either definition of the term "aircraft", the definition includes within its scope a model aircraft. That argument is, however, contradicted in that Complainant FAA has, heretofore, discriminated in his interpretation/application of those definitions.

Complainant has, historically, in their policy notices, modified the term "aircraft" by prefixing the word "model", to distinguish the device/contrivance being considered. By affixing the word "model" to "aircraft" the reasonable inference is that Complainant FAA intended to distinguish and exclude model aircraft from either or both of the aforesaid definitions of "aircraft".

To accept Complainant's interpretive argument would lead to a conclusion that those definitions include as an aircraft all types of devices/contrivances intended for, or used for, flight in the air. The extension of that conclusion would then result in the risible argument that a flight in the air of, e.g., a paper aircraft, or a toy balsa wood glider, could subject the "operator" to the regulatory provisions of FAA Part 91, Section 91.13(a).

Complainant's contention that a model aircraft is an "aircraft", as defined in either the statutory or regulatory definition, is diminished on observation that FAA historically has not required model aircraft operators to comply with requirements of FAR Part 21, Section 21.171 et seq and FAR Part 47, Section 47.3, which require Airworthiness and Registration Certification for an aircraft. The reasonable inference is not that FAA has overlooked the requirements, but, rather that FAA has distinguished model aircraft as a class excluded from the regulatory and statutory definitions.

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[5] 49 U.S.C. Section 40102(a)(6): Aircraft means any contrivance invented, used, or designed to navigate or fly in the air.

[6] Webster's New Dictionary of Synonyms, "contrivance" at 188; "device" at 236. Roget's Thesaurus 4th Ed. At 348.1.

While Complainant states in his Sur-Reply Brief that he is not seeking herein to enforce FAA Policy Statements/Notices concerning model aircraft operation, a consideration of those policy notices is informative.[7]

Complainant FAA issued Advisory Circular (AC) AC 91-57, entitled "Model Aircraft Operating Standards", stating the purpose as "...encouraging voluntary compliance with safety standards for model aircraft operators..."[8] That Complainant FAA issued an AC urging model aircraft operators to voluntarily comply with the therein stated "Safety Standards"[9] is incompatible with the argument that model aircraft operators, by application of the statutory and regulatory definition, "aircraft" were simultaneously subject to mandatory compliance with the FARs and subject to FAR regulatory enforcement.

That FAA has not deemed every device used for flight in the air to be within the FAR Part 1, Section 1.1 definition, and thus subject to provisions of Part 91 FARs, is illustrated on consideration of the FAA regulatory treatment of Ultralights.

An Ultralight, a device used for flight in the air, is nevertheless governed by the provisions of Part 103 FARs, and whereupon meeting the criteria stated in Section 103.1 is defined, not as an "aircraft", but as an "Ultralight Vehicle", subject only to the particular regulatory provisions of Part 103, FARs.

It is concluded that, as Complainant: has not issued an enforceable FAR regulatory rule governing model aircraft operation; has historically exempted model aircraft from the statutory FAR definitions of "aircraft" by relegating model aircraft operations to voluntary compliance with the guidance expressed in AC 91-57, Respondent's model aircraft operation was not subject to FAR regulation and enforcement.

As previously noted, Complainant has disclaimed that, in this litigation, he is seeking to enforce FAA UAS policy; however, the Complaint asserts that the "aircraft" being operated by Respondent "is an Unmanned Aircraft System (UAS)". Since the classification UAS does not appear in the FARs, it is necessary to examine the FAA policy for the existence of a rule imposing regulatory authority concerning UAS operations.

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[7] FAA Policy Notices are addressed subsequently.
[8] Attachment 3, Advisory Circular, AC 91-57, June 9, 1981.
[9] Id. at Paragraph 3.

FAA issued on September 16, 2005, Memorandum AFS-400 UAS Policy 05-01 (Policy 05-01)[10], which was subsequently cancelled, revised, and re-issued on March 13, 2008, as Interim Operational Approval Guidance 08-01 (Guidance 08-01).[11] The stated purpose of those Memoranda was to issue guidance, not to the general public, but, rather as internal guidance to be used by the appropriate FAA personnel.[12] Significantly, both Memoranda specifically eschew any regulatory authority of the expressed policy, stating respectively that, "this policy is not meant as a substitute for any regulatory process..."[13]

As policy statements of an agency are not – aside from the fact that the guidance policy therein expressed is stated as for internal FAA use – binding upon the general public[14], and as any regulatory effect is disclaimed, these Policy Memoranda cannot be, and are not, found as establishing a valid rule for classifying a model aircraft as an UAS, or as furnishing basis for assertion of FAR regulatory authority vis á vis model aircraft operations.

On February 13, 2007, FAA Notice 07-01 was published in the Federal Register with the stated purpose/action of serving as "Notice of Policy; opportunity for feedback..."[15] Under the Section captioned "Policy Statement", it is stated that for an UAS to operate in the National Airspace System (NAS), specific authority is required, and that, pertinent here, for civil aircraft that authority is a special airworthiness certificate. It excludes from that requirement "modelers" – recreational/sport users – and the operational safety authority is iterated as AC 91-57. It further provides that when the model aircraft is used for "business purposes"[16] – AC 91-57 is not applicable, as by such use the model aircraft is deemed an UAS, requiring special airworthiness

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[10] Title: Unmanned Aircraft Systems Operations in the U.S. National Airspace System - Interim Operational Approval Guidance.

[11] Title: Unmanned Aircraft Systems Operations in the U.S. National Airspace System.

[12] Policy 05-01 at 1; Guidance 08-01 at 2.

[13] Policy 05-01 at 1; Guidance 08-01 at 2,3.

[14] Syncor Int'l Corp. v. Shalala, 56F.3d 592, 595 (5th Cir. 1995).

[15] 72 Fed. Reg. 6689 (2007).

[16] Id at 6690 (2007), Policy Statement "business" is not defined, so it is unclear if the term is limited to ongoing enterprises held out to the general public, or if it includes a one-time operation for any form or amount of compensation.

certification.[17] In my view, the iteration of the authority of AC 91-57, even though restricted here, undercuts the contention that model aircraft were considered an aircraft as defined in the FARs, or the Code, and subject to Part 91 FAR regulation.

Notice 07-01 expressly states that its action/purpose is to set forth the current FAA policy for UAS operations, and the requirements are stated, as noted above, under the Section captioned "Policy Statement". As self-defined as a statement of policy, it cannot be considered as establishing a rule or enforceable regulation, since, as discussed supra, policy statements are not binding on the general public.

As Notice 07-01 was published in the Federal Register, even though stated as a "Notice of Policy", it could be argued that it could be considered as legislative rulemaking purporting to set out new, mandatory requirements/limitations requiring public compliance.

Notice 07-01 does not, however, meet the criteria for valid legislative rulemaking, as it was not issued as a Notice of Proposed Rulemaking (NPRM), and if intended to establish a substantive rule, it did not satisfy the requirements of 5 U.S.C., Section 553(d), which requires publication of notice not less than 30 days before the effective date.[18] As it is shown as being issued on February 6, 2007, and published as a Notice of Policy February 13, 2007, it fails this requirement.

It is significant that upon comparison of the allegations in the Complaint with the statements put forward in the Policy Statement Section of Notice 07-01, that the allegations made in Complaint Paragraphs 2, 5, and 6, mirror the Policy Notice provisions. That fact contradicts Complainant's assertion that Policy Notice 07-01 plays no part in this litigation. Those allegations are also found as being inconsistent with the assertion that model aircraft were always included in the FAR Part 1, Section 1.1 definition, and thus subject to Part 91 FAR regulation. If so, it was unnecessary to allege – as in Paragraphs 5 and 6 – flight for compensation/payment which appears to be for the purpose of re-classifying Respondent's model aircraft as an UAS within the terminology of Notice 07-01.[19]

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[17] 72 Fed. Reg. 6690 (2007).

[18] 5 U.S.C. Section 553 - Rulemaking. The exceptions stated in Section 553(d) are not applicable, particularly Exception (2), in that Notice 07-01 does not interpret an existing rule or policy statement - it is a statement of current policy.

[19] On Complainant's theory, Respondent could be charged directly as operating an "aircraft" contrary to the provisions of Section

Congress enacted the FAA Modernization Re-authorization and Reform Act of 2012 (2012 Act), and therein addressed in Subtitle B, Unmanned Aircraft Systems.[20] This legislation postdates the events at issue herein; however, the language of provisions of the 2012 Act is instructive.

The 2012 Act requires FAA, through the Secretary of Transportation, to develop a plan for integration of civil UAS into the NAS, specifying that the plan contain recommendations for rulemaking to define acceptable standards for operation and certification of civil UAS.[21] The 2012 Act further, in the Subsection Rulemaking, specifies a date for publication of "(1) a final rule on small UAS..." to permit their operation in the NAS.[22] The 2012 Act also contains a provision stating that the Administrator, FAA, "...may not promulgate any rule or regulation regarding a model aircraft...", where the model aircraft satisfies the criteria stated therein.[23] It is a reasonable inference that this language shows that, at the time of enactment of the 2012 Act, the legislators were of the view there were no effective rules or regulations regulating model aircraft operation, elsewise, rather than calling for enactment of such, the 2012 Act would have called for action to repeal, amend, or modify the existing rules or regulations, and not require a date for issuance of a final rule.

I find that:

1. Neither the Part 1, Section 1.1, or the 49 U.S.C. Section 40102(a)(6) definitions of "aircraft" are applicable to, or include a model aircraft within their respective definition.[24]
2. Model aircraft operation by Respondent was subject only to the FAA's requested voluntary compliance with the Safety Guidelines stated in AC 91-57.

91.13(a). Compensation/payment could arguably then be a factor for resolving: careless or reckless operation; appropriate sanction/severity of a civil penalty.

[20] Public Law 112-95, 126 Stat. 72 (February 14, 2012).

[21] Id at Section 332(a)(1)(2)(1)(b)(i).

[22] Id at Section 332(b), Rulemaking.

[23] Id at Section 332(a).

[24] Accepting Complainant's overreaching interpretation of the definition "aircraft", would result reductio ad obsurdum in assertion of FAR regulatory authority over any device/object used or capable of flight in the air, regardless of method of propulsion or duration of flight.

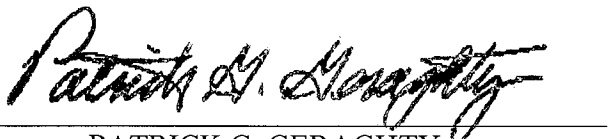
3. As Policy Notices 05-01 and 08-01 were issued and intended for internal guidance for FAA personnel, they are not a jurisdictional basis for asserting Part 91 FAR enforcement authority on model aircraft operations.
4. Policy Notice 07-01 does not establish a jurisdictional basis for asserting Part 91, Section 91.13(a) enforcement on Respondent's model aircraft operation, as the Notice is either (a) as it states, a Policy Notice/Statement and hence non-binding, or (b) an invalid attempt of legislative rulemaking, which fails for non-compliance with the requirement of 5 U.S.C. Section 553, Rulemaking.
5. Specifically, that at the time of Respondent's model aircraft operation, as alleged herein, there was no enforceable FAA rule or FAR Regulation applicable to model aircraft or for classifying model aircraft as an UAS.[25]

Upon the findings and conclusions reached, I hold that Respondent's Motion to Dismiss must be **AFFIRMED**.

IT IS ORDERED THAT:

1. Respondent's Motion to Dismiss be, and hereby is: **GRANTED**.
2. Complainant's Order of Assessment be, and hereby is: **VACATED AND SET ASIDE**.
3. This proceeding be, and is: **TERMINATED WITH PREJUDICE**.[26]

ENTERED this 6th day of March, 2014, at Denver, Colorado.



PATRICK G. GERAGHTY
JUDGE

[25] On the FAA's decades long holding out to model aircraft operators/public that the only FAA policy regarding model aircraft operations was the requested voluntary compliance with the Safety Guidelines of AC 91-57, it would likely require for assertion of a Rule or FAR authority concerning model aircraft operations, for the FAA to undertake rulemaking as required by 5 U.S.C. Section 553 Rulemaking. Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999), Shell Offshore, Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001).

[26] In light of the decision reached herein, other issues raised, and argument made need not be, and are not, addressed.

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.