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NTSB Order No. EA-5730

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of November, 2014

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. RAPHAEL PIRKER, Respondent.	)	Docket CP-217

OPINION AND ORDER

1. ***Background***

The Administrator of the Federal Aviation Administration (FAA) appeals the decisional order of Administrative Law Judge Patrick G. Geraghty, issued March 6, 2014, vacating the Administrator's order of assessment against respondent.[1] The assessment ordered respondent to pay a civil penalty in the amount of $10,000.00 based on a violation of 14 C.F.R. § 91.13(a) for

[1] A copy of the decisional order is attached.

alleged careless or reckless operation of an unmanned aircraft.[2] The law judge's order terminated the enforcement proceeding against respondent, and found § 91.13(a) did not apply to respondent's unmanned aircraft because the device was not an "aircraft" for purposes of the regulation. For the following reasons, we reverse the law judge's decisional order and remand for further proceedings.

The Administrator issued an assessment order, which served as the complaint in the underlying proceeding, on June 27, 2013. The complaint alleged respondent remotely piloted an unmanned aircraft—a Ritewing Zephyr—in a series of maneuvers around the University of Virginia (UVA) campus in Charlottesville, Virginia, on October 17, 2011. The complaint alleged respondent operated the unmanned aircraft at altitudes ranging from the "extremely low"—10 feet above ground level (AGL)—up to 1,500 feet AGL. In the complaint, the Administrator also asserted respondent operated the aircraft, *inter alia*, "directly towards an individual standing on a . . . sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by [the] aircraft"; "through a . . . tunnel containing moving vehicles"; "under a crane"; "below tree top level over a tree lined walkway"; "under an elevated pedestrian walkway"; and "within approximately 100 feet of an active heliport." Respondent allegedly conducted these maneuvers as part of flights for compensation, as the aircraft was equipped with a camera and respondent was "being paid by [a third party] to supply aerial photographs and video of the UVA campus and medical center."

Respondent appealed the Administrator's order, and subsequently filed a motion to dismiss the complaint as a matter of law. The Administrator contested respondent's motion, and

[2] Section 91.13(a) prohibits operation of "an aircraft in a careless or reckless manner so as to endanger the life or property of another."

the law judge later permitted additional pleadings from the parties. The law judge's decisional order granted respondent's appeal.

B. *Law Judge's Decisional Order*

When respondent moved to dismiss the complaint, he argued the Federal Aviation Regulations (FARs),[3] which govern the operation of "aircraft," did not apply to respondent's Ritewing Zephyr. In this regard, respondent argued the aircraft was a "model aircraft" not subject to the regulatory provisions applicable to "aircraft." After considering the parties' written submissions on the motion, the law judge concluded in his decisional order the Zephyr was a "model aircraft" to which § 91.13(a) did not apply.

Citing the FAA's 1981 advisory circular setting forth "safety standards" for "model aircraft" operations (AC 91-57, June 9, 1981),[4] as well as a 2007 policy notice,[5] the law judge explained the "FAA has distinguished model aircraft as a class excluded from the regulatory and statutory definitions [of the term 'aircraft']." The law judge further stated, "[b]y affixing the word 'model' to 'aircraft' the reasonable inference is that [the Administrator] intended to distinguish and exclude model aircraft" from regulatory provisions applicable to "aircraft."[6] Accepting the Administrator's position that respondent's Zephyr was an "aircraft" for purposes of the FARs, the law judge reasoned, "would . . . result in the risible argument that a flight in the

[3] 14 C.F.R. §§ 1.1, et seq.

[4] Available at www.faa.gov/documentlibrary/media/advisory_circular/91-57.pdf.

[5] Fed. Aviation Admin., *Unmanned Aircraft Operations in the National Airspace System*, Notice 07-01, 72 Fed. Reg. 6689 (Feb. 13, 2007) (hereinafter "FAA Notice 07-01").

[6] Decisional Order at 3.

air of, *e.g.*, a paper aircraft, or a toy balsa wood glider, could subject the 'operator' to the regulatory provisions of [14 C.F.R. part 91 and] Section 91.13(a)."[7]

C. *Issues on Appeal*

The Administrator appeals the law judge's order, and presents two main issues. The Administrator argues the law judge erred in determining respondent's Zephyr was not an "aircraft" under 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1. The Administrator contends the law judge erred in determining respondent's aircraft was not subject to 14 C.F.R. § 91.13(a). We reverse and remand for further proceedings consistent with this Opinion and Order.

2. *Decision*

We review the law judge's order *de novo*.[8] In addition, we apply rules of construction to interpret statutes and regulations.[9] If the language of a provision is clear and unambiguous on its face, the language controls; if the language is ambiguous, we interpret the provision in reference to, among other factors, the context in which it appears.[10]

A. *Definition of "Aircraft"*

This case has provoked interest from a diverse set of stakeholders in the Nation's aviation system, and numerous stakeholders have submitted *amici* briefs in this case on matters ranging

[7] Id.

[8] Administrator v. Dustman, NTSB Order No. EA-5657 at 6 (2013) (citing Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972)).

[9] See generally Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO, 676 F.3d 566, 570 (7th Cir. 2012), as amended (May 9, 2012) (stating, "[t]he same rules of construction apply to administrative rules as to statutes."); see also Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 19-22 (2008).

[10] See Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997).

from principles of rulemaking and due process to First Amendment issues. At this stage of the proceeding, however, we decline to address issues beyond the threshold question that produced the decisional order on appeal: Is respondent's unmanned aircraft system (UAS) an "aircraft" for purposes of § 91.13(a), which prohibits any "person" from "operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another"?[11] We answer that question in the affirmative.

1. *Plain Language*

The Administrator's authority to ensure aviation safety largely rests upon the Administrator's statutory responsibility to regulate the operation of "aircraft."[12] Title 49 U.S.C. § 40102(a)(6) defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air." Similarly, 14 C.F.R. § 1.1 defines "aircraft" for purposes of the FARs, including § 91.13, as "a device that is used or intended to be used for flight in the air." The definitions are clear on their face. Even if we were to accept the law judge's characterization of respondent's aircraft, allegedly used at altitudes up to 1,500 feet AGL for commercial purposes, as a "model aircraft," the definitions on their face do not exclude even a "model aircraft" from the meaning of "aircraft." Furthermore, the definitions draw no distinction between whether a device is

[11] Some of the legal issues presented in *amici* briefs are not within the Board's jurisdiction. For example, we have long held that constitutional issues, such as the First Amendment issues raised by *amici* news organizations, are outside the scope of our review. See, e.g., Garvey v. McCullough, NTSB Order No. EA-4592 at 2-3 (1997) (noting "the Board does not have the ultimate authority to rule on constitutional questions"); Hinson v. Ciampa, NTSB Order No. EA-4210 at 4 (1994).

[12] See, e.g., 49 U.S.C. §§ 40103(b)(1) ("The Administrator . . . shall . . . assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."), 44701 ("The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing [safety regulations in various areas].").

manned or unmanned. An aircraft is "any" "device" that is "used for flight." We acknowledge the definitions are as broad as they are clear, but they are clear nonetheless.

Respondent points out the statutory and regulatory definitions of "aircraft" are drafted in passive voice and reflect what respondent views as an implication that an *individual* flies or navigates in the air by "using" an aircraft to do so. Respondent argues the term "aircraft" means a device that sustains one or more individuals in flight, thus excluding unmanned aircraft from the definition.[13] We disagree.

When Congress enacted the Federal Aviation Act of 1958 (which created the Federal Aviation Agency) and defined "aircraft" in the predecessor provision of 49 U.S.C. § 40102(a)(6),[14] so-called "drones" were largely the currency of science fiction. Congress demonstrated prescience, however, in the early definition of "aircraft"; it expressly defined the term as any airborne contrivance "now known *or hereafter* invented, used, or designed for navigation of or flight in the air."[15] Respondent points to the legislative history of the Act—as well as a reference in the Act to policies in furtherance of "air transportation"[16]—as evidence Congress intended the term "aircraft" to mean a manned aircraft. However, the Act did not

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[13] Reply Br. at 14-16.

[14] Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(5), 72 Stat. 731, 737 (1958).

[15] Id. (emphasis added).

[16] Respondent cites a provision of the Act (section 102) containing a reference to "air transportation" in the context of a declaration of national aviation policy. Reply Br. at 15. This section, however, applied to the regulatory functions of the Civil Aeronautics Board, which regulated the rates and routes of air carriers. [But sections 102(b) and 102(e) refer to "safety".] The duties of the Administrator of the Federal Aviation Agency were the subject of the following section, section 103, which directed the Administrator to consider safety-related policy interests, including: "the regulation of air commerce in such manner as to best promote its development and safety" and "control of the use of the navigable airspace . . . and the regulation of both civil and military operations in such airspace." Pub. L. No. 85-726, § 103, 72 Stat. 740.

contain such a distinction, and the definition's use of the passive voice in describing a device that is "used" for flight does not exclude unmanned aircraft. If the operator of an unmanned aircraft is not "using" the aircraft for flight and some derivative purpose—be it aerial photography or purely recreational pleasure—there would be little point in buying such a device. In summary, the plain language of the statutory and regulatory definitions is clear: an "aircraft" is any device used for flight in the air.

Furthermore, the statutory and regulatory definitions, as well as Advisory Circular 91-57, and FAA Notice 07-01, contain no express exclusion for unmanned or model aircraft. Neither these definitions nor the plain text of § 91.13(a) implies model aircraft are exempt from certain requirements. The Administrator may choose to exclude certain types of aircraft in a practical sense, by refraining from bringing a charge under the FARs against a model aircraft operator; Advisory Circular 91-57 implies such a practice, and the processes outlined in 14 C.F.R. §§ 11.81 – 11.103 provide a more formal means of seeking exemption. However, for the case *sub judice*, the plain language of § 91.13(a), as well as the definitions quoted above, does not exclude certain categories of aircraft. Therefore, we find the law judge erred in presuming the regulations categorically do not apply to model aircraft. The plain language of the definitions and regulation at issue simply does not support such a conclusion.

2. *FAA Policies Regarding Unmanned Aircraft*

In 1981, the FAA issued Advisory Circular 91-57, which "outlines, and encourages voluntary compliance with, safety standards for model aircraft operators." The advisory circular directs such operators, for example, not to "fly model aircraft higher than 400 feet above the surface" and to take measures to keep model aircraft clear of other aircraft, "populated areas,"

and "noise sensitive areas."[17] The advisory circular does not on its face exclude "model aircraft" from the ambit of 14 C.F.R. part 91. In addition, the advisory circular neither defines "model aircraft" nor excludes "model aircraft" from the definition of "aircraft" for purposes of the FARs.

In 2007, some 26 years after issuing the advisory circular, amidst growing Congressional interest in rulemaking on unmanned aircraft[18] and growing public interest in the subject of UASs generally, the FAA issued Notice 07-01. The notice clarified the FAA's requirements regarding unmanned aircraft operations. However, as explained below, the notice does not dispose of the issue in this case, which is whether § 91.13(a) applies to unmanned aircraft operations.

B. *Applicability of § 91.13(a) to Respondent's Aircraft*

Turning to the issue of the Administrator's interpretation that § 91.13(a) applies to unmanned aircraft, we find the interpretation is reasonable. The Supreme Court has stated an agency may articulate an interpretation of a regulation via the adjudicative process.[19] Courts have deferred to such interpretations as long as the interpretation is grounded in a reasonable reading of the regulation's text and purpose.[20] Furthermore, even when the interpretation is

[17] Id. at ¶ 3.

[18] See, e.g., Federal Aviation Administration Reauthorization Act of 2007, H.R. 2881, title III, subtitle B (110th Cong. 2007) (House-passed FAA reauthorization that was not enacted but would have required rulemaking on, *inter alia*, integration into the National Airspace System of commercial unmanned aircraft and development of requirements for integration of small unmanned aircraft).

[19] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974); cf. Morton v. Ruiz, 415 U.S. 199, 232 (1974) (cautioning agencies "to avoid the inherently arbitrary nature of unpublished ad hoc determinations"); see also AKM LLC v. Sec'y of Labor, 675 F.3d 752, 754 (D.C. Cir. 2012) (citing Martin v. OSHRC, 499 U.S. 144 (1991), and stating the Chevron standard supplying deference to the agency's interpretation applies, "even if the [agency's] interpretation arises in an administrative adjudication rather than in a formal rulemaking process").

[20] Otis Elevator Co. v. Sec'y of Labor, --- F.3d ----, 2014 WL 3973148 (D.C. Cir. 2014); see also Taylor v. Huerta, 723 F.3d 210 (D.C. Cir. 2013) (stating, "[n]or is it uncommon for an

novel, courts will defer to it, as long as an agency "adequately explains the reasons for a reversal of policy."[21]

As stated above, in the case *sub judice*, the Administrator's application of § 91.13(a) to respondent's aircraft is reasonable. Section 91.13(a) states, "*Aircraft operations for the purpose of air navigation*. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." As discussed above, neither the plain language of § 91.13(a) nor the definitions of "aircraft" applicable to regulations in 14 C.F.R. part 91 exclude unmanned aircraft. The Administrator's interpretation of this text—that it applies to respondent's operation of his Zephyr to prohibit careless or reckless operations—is reasonable, given the broad language of the section. In addition, the Administrator's preamble text in its Notices of Proposed Rulemaking, published in the *Federal Register* under the Administrative Procedure Act for promulgation of § 91.13(a), do not contain any language indicating its application of § 91.13(a) to respondent's aircraft is an unreasonable reading of the regulation's text and purpose.[22] The Board has affirmed the Administrator's application of § 91.13(a) as an alleged independent violation in other cases in which, presumably, no other regulation would have explicitly prohibited the alleged conduct.[23]

(..continued)
adjudicative body to defer to the reasonable legal interpretations of an agency clothed with enforcement and rulemaking powers").

[21] National Cable & Telecommunications Ass'n v. Brand X Internet Serv.. 545 U.S. 967, 981 (2005).

[22] 50 Fed. Reg. 11292 (Mar. 20, 1985); 46 Fed. Reg. 45256 (Sept. 10, 1981).

[23] See, e.g., Administrator v. Nickl, NTSB Order No. EA-5287 (2007); see generally Administrator v. Hollabaugh, NTSB Order No. EA-5609 (2011).

Moreover, the Administrator's position that respondent's Zephyr is an "aircraft" is consistent with the Administrator's regulations at 14 C.F.R. part 101, promulgated in part on authority of some of the same statutory provisions underlying § 91.13(a),[24] which imposes specific operating limitations with respect to unmanned free balloons, kites, rockets, and moored balloons that rise or travel above the surface of the earth. The language of 14 C.F.R. § 91.1(a) specifically excludes these aircraft, as well as ultralights, from the requirements of part 91. Instead, 14 C.F.R. parts 101 and 103 contain regulations governing those types of aircraft. Though they are subject to special operating rules, the unmanned devices covered under part 101 nonetheless are "aircraft." The regulations contain no text suggesting the Administrator considers those devices to be something other than "aircraft"; in fact, § 91.1(a), in excluding the devices from the ambit of part 91, specifically refers to the devices as a subset of the term "aircraft."[25] The Administrator's position in this matter that respondent's unmanned aircraft is an "aircraft," to which § 91.13(a) applies, comports with the regulatory approach contained in part 101.

Respondent and some *amici* challenge the Administrator's position as based on a "new" interpretation of 14 C.F.R. §§ 1.1 and 91.13(a) that conflicts with prior agency practice and policy and thus, does not warrant deference. In particular, respondent cites a 2001 internal memorandum by a manager within the FAA's Air Traffic Organization advising the FARs do not

[24] See note 12, supra; 49 U.S.C. §§ 40103 and 44701.

[25] 14 C.F.R. § 91.1(a) states, "this part prescribes rules governing the operation of aircraft (other than moored balloons, kites, unmanned rockets, and unmanned free balloons, which are governed by part 101 of this chapter, and ultralight vehicles operated in accordance with part 103 of this chapter) within the United States . . . ."

apply to "[m]odel aircraft."[26] In addition, respondent relies on a letter attached as Exhibit L to his reply brief, which appears to be the FAA's position in response to the request that precipitated the aforementioned memorandum in Exhibit K. The letter in Exhibit L makes no mention of whether § 91.13(a) applies to unmanned aircraft. Respondent also cites a letter by the then-director of the FAA's Flight Standards Division advising a Member of Congress: "a more stringent regulatory approach [than the advisory circular] was necessary" to address increasing unmanned aircraft operations.[27] However, this document, like the others, does not state § 91.13(a) only applies to manned aircraft.

Nothing in Advisory Circular 91-57, on its face, reflects any intent on the part of the FAA to exempt operators of unmanned or "model aircraft" from the prohibition on careless or reckless operation in § 91.13(a). At most, we discern in the advisory circular a recognition on the Administrator's part that certain provisions of the FARs may not be logically applicable to model aircraft flown for recreational purposes. But nothing in the text of the document disclaims, implicitly or explicitly, the Administrator's interest in regulating operations of model aircraft that pose a safety hazard. More importantly, the advisory circular puts the reasonable reader on notice of the Administrator's intent to ensure the safe operation of model aircraft by appropriate means.

[26] Resp. Br. at 11; Resp. Br. Exh. K. This internal memorandum does not appear to have been distributed to the public at large as official FAA guidance on the subject of unmanned aircraft operations. It appears to have been written by an Air Traffic Organization manager who is not an official of the Flight Standards division with formal responsibility for prosecuting enforcement proceedings under the FARs.

[27] Resp. Br. at 11-12; Resp. Br. Exh. M.

C. *Conclusion*

This case calls upon us to ascertain a clear, reasonable definition of "aircraft" for purposes of the prohibition on careless and reckless operation in 14 C.F.R. § 91.13(a). We must look no further than the clear, unambiguous plain language of 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1: an "aircraft" is any "device" "used for flight in the air." This definition includes any aircraft, manned or unmanned, large or small. The prohibition on careless and reckless operation in § 91.13(a) applies with respect to the operation of any "aircraft" other than those subject to parts 101 and 103. We therefore remand to the law judge for a full factual hearing to determine whether respondent operated the aircraft "in a careless or reckless manner so as to endanger the life or property of another," contrary to § 91.13(a).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The law judge's decisional order is reversed; and

3. The case is remanded to the law judge for further proceedings consistent with this Opinion and Order.

HART, Acting Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.