

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, *

Docket CP-217

v. *

RAPHAEL PIRKER, *

Respondent. *

SERVICE:

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Kramer, Levin, Naftalis & Frankel, LLP
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(Certified Mail and FAX)

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FAA Eastern Region
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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 Response⁴ 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

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.

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.

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 public¹⁴, 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

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

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, otherwise, 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 absurdum 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.

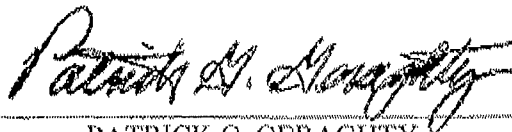
3. As Policy Notices 05-01 and 08-01 were issued and intended for internal guidance for FAA personnel, they are not a jurisdictional basis for asserting Part 91 FAR enforcement authority on model aircraft operations.
4. Policy Notice 07-01 does not establish a jurisdictional basis for asserting Part 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.



ATTACHMENT 1

U.S. Department
of Transportation

Federal Aviation
Administration

Eastern Region
Regional Counsel
Telephone: 718 563-3269
Facsimile: (718) 995-5699

1 Aviation Plaza
Jamaica, NY 11434

JUN 27 2013

FEDERAL EXPRESS, REGISTERED MAIL - RETURN RECEIPT REQUESTED, AND
ELECTRONIC MAIL

Raphael Pirker
Melchutistrasse 47
8304 Zurich
Switzerland

Docket No. 2012EA210009

ORDER OF ASSESSMENT

On April 13, 2012, you were advised through a Notice of Proposed Assessment that the FAA proposed to assess a civil penalty in the amount of \$10,000.

After consideration of all the available information, it appears that:

1. On or about October 17, 2011, you were the pilot in command of a Ritewing Zephyr powered glider aircraft in the vicinity of the University of Virginia (UVA), Charlottesville, Virginia.
2. The aircraft referenced above is an Unmanned Aircraft System (UAS).
3. At all times relevant herein you did not possess a Federal Aviation Administration pilot certificate.
4. The aircraft referenced above contained a camera mounted on the aircraft which sent real time video to you on the ground.
5. You operated the flight referenced above for compensation.
6. Specifically, you were being paid by Lewis Communications to supply aerial photographs and video of the UVA campus and medical center.
7. You deliberately operated the above-described aircraft at extremely low altitudes over vehicles, buildings, people, streets, and structures.

8. Specifically, you operated the above-described aircraft at altitudes of approximately 10 feet to approximately 400 feet over the University of Virginia in a careless or reckless manner so as to endanger the life or property of another.
9. For example, you deliberately operated the above-described aircraft in the following manner:
 - a. You operated the aircraft directly towards an individual standing on a UVA sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by your aircraft.
 - b. You operated the aircraft through a UVA tunnel containing moving vehicles.
 - c. You operated the aircraft under a crane.
 - d. You operated the aircraft below tree top level over a tree lined walkway.
 - e. You operated the aircraft within approximately 15 feet of a UVA statue.
 - f. You operated the aircraft within approximately 50 feet of railway tracks.
 - g. You operated the aircraft within approximately 50 feet of numerous individuals.
 - h. You operated the aircraft within approximately 20 feet of a UVA active street containing numerous pedestrians and cars.
 - i. You operated the aircraft within approximately 25 feet of numerous UVA buildings.
 - j. You operated the aircraft on at least three occasions under an elevated pedestrian walkway and above an active street.
 - k. You operated the aircraft directly towards a two story UVA building below rooftop level and made an abrupt climb in order to avoid hitting the building.
 - l. You operated the aircraft within approximately 100 feet of an active heliport at UVA.
10. Additionally, in a careless or reckless manner so as to endanger the life or property of another, you operated the above-described aircraft at altitudes between 10 and 1500 feet AGL when you failed to take precautions to prevent collision hazards with other aircraft that may have been flying within the vicinity of your aircraft.
11. By reason of the above, you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations:

- a. Section 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

NOW THEREFORE, IT IS ORDERED, pursuant to 49 U.S.C. §§46301(a)(1) and (d)(2) and 46301(a)(5), that you be and hereby are assessed a civil penalty in the amount of \$10,000.

You may pay the penalty amount by submitting a certified check or money order payable to the "Federal Aviation Administration" to the Office of Accounting, 1 Aviation Plaza, Jamaica, NY 11434. **In the alternative, you may pay your civil penalty with a credit card over the Internet. To pay electronically, visit the web site at <http://div.dot.gov/fea.htm> and click on "Civil Fines and Penalty Payments" which will bring you to the "FAA Civil Penalty Payments Eastern Region" page. You must then complete the requested information and click "submit" to pay by credit card.**

ATTACHMENT 2



Specifications

MODEL: Zephyr II

MANUFACTURER: RiteWingRC (ritewingrc.com)

DISTRIBUTOR: RiteWingRC

TYPE: electric flying wing

SMALLEST FLYING AREA: football field

IDEAL FOR: intermediate or advanced

WINGSPAN: 56 in.

WING AREA: 770 sq. in.

READY-TO-FLY WEIGHT: 4lbs 7oz

WING LOADING: 16 oz sq.ft

PRICE: \$130.00

CENTER-OF-GRAVITY: 9 3/8" back from nose

GEAR USED

Radio: Spektrum DX8, Orange rx, (2) RiteWingRC metal gear servos-elevons

Motor: RiteWingRC 1200kv, 65amp ESC (ritewingrc.com), Turnigy 5amp 26v BEC (hobbyking.com)

ATTACHMENT 3

AC 91-57

DATE June 9, 1981


ADVISORY CIRCULAR



DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Washington, D.C.

Subject: MODEL AIRCRAFT OPERATING STANDARDS

1. PURPOSE. This advisory circular outlines, and encourages voluntary compliance with, safety standards for model aircraft operators.
2. BACKGROUND. Modelers, generally, are concerned about safety and do exercise good judgement when flying model aircraft. However, model aircraft can at times pose a hazard to full-scale aircraft in flight and to persons and property on the surface. Compliance with the following standards will help reduce the potential for that hazard and create a good neighbor environment with affected communities and airspace users.
3. OPERATING STANDARDS.
 - a. Select an operating site that is of sufficient distance from populated areas. The selected site should be away from noise sensitive areas such as parks, schools, hospitals, churches, etc.
 - b. Do not operate model aircraft in the presence of spectators until the aircraft is successfully flight tested and proven airworthy.
 - c. Do not fly model aircraft higher than 400 feet above the surface. When flying aircraft within 3 miles of an airport, notify the airport operator, or when an air traffic facility is located at the airport, notify the control tower, or flight service station.
 - d. Give right of way to, and avoid flying in the proximity of, full-scale aircraft. Use observers to help if possible.
 - e. Do not hesitate to ask for assistance from any airport traffic control tower or flight service station concerning compliance with these standards.


R. J. VAN VUREN
Director, Air Traffic Service

Initiated by: AAT-220

(hobbyking.com)