UNITED STATES NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINSTRATIVE LAW JUDGES

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration,	)	
Complainant,	)	DOCKET CP-217
v.	)	
Raphael Pirker,	)	
Respondent.	)	

AMICUS CURIE BRIEF OF THE
NATIONAL AGRICULTURAL AVIATION ASSOCIATION

COMES NOW the National Agricultural Aviation Association ("NAAA"), pursuant to 49 C.F.R. §821.9(b) and submits this Amicus Curie Brief. In submitting this Brief, NAAA relies upon: (1) the Introduction and Summary of Argument, (2) the Statement of Facts, (3) the Argument and Citation of Authorities, and (4) the Conclusion set forth hereinbelow.[1]

I.

Introduction and Summary of Argument

As NAAA will more fully argue in the remainder of this brief, there are three reasons why the Decisional Order of Judge Geraghty dated March 6, 2014 in the instant matter should be reversed, to-wit:

(1) Treating Respondent's Motion as a motion to dismiss, it was prejudicial error to dismiss the Complaint.

(2) Treating Respondent's Motion to Dismiss as a motion for summary judgment, it was prejudicial error to dismiss the Complaint.

[1] NAAA has filed a Motion for Leave to Submit this Brief in accordance with 49 C.F.R. §821.9(b), contemporaneous with submission of this Brief.

(3) Even assuming the vehicle is construed to be a "model aircraft," still, the Respondent would only be exempt from FAA sanctions if the vehicle were operated in accordance with FAA Advisory Circular AC 91-57, the basic safety guidelines observed by the operators of model aircraft. There being no evidence in the record to support this position, the FAA's Complaint should not have been dismissed without an evidentiary hearing.

II.

Statement of Facts

A. The Complaint.

On June 27, 2013, the Administrator served his Order of Assessment seeking a $10,000.00 civil penalty from the Respondent. Thereafter, the Respondent appealed the Order of Assessment to the National Transportation Safety Board ("NTSB"). The Administrator then filed as his Complaint the Order of Assessment. (Administrator's Complaint). The Administrator alleged, *inter alia*, that an unmanned aircraft system (UAS) was operated on October 17, 2011, in the vicinity of the University of Virginia (UVA) in Charlottesville, Virginia. (Comp. ¶¶1, 2). The Administrator asserted that Respondent did not have a valid pilot certificate. (*Id.*, ¶3). The aircraft was allegedly operated with a camera mounted aboard the aircraft which sent real time video to Respondent on the ground and was operated in flight for compensation by Lewis Communications in and around the UVA campus at low altitudes over vehicles, buildings, people, streets and structures. (Comp., ¶¶3 - 7).

According to the allegations made in the Complaint, the altitudes at which the aircraft was operated varied between 10 feet and 400 feet (Comp., ¶8); but the Administrator further alleged that the aircraft was operated at altitudes *between 10 feet and 1,500 feet* above ground

level when Respondent allegedly failed to take precautions to prevent collision hazards with other aircraft that may have been flying in the vicinity of the aircraft in question. (*Id.*, ¶10)

The Administrator alleged that the aircraft was operated towards individuals standing on a sidewalk, through a tunnel, under a crane, below treetop level, within 15 feet of a statue, within 50 feet of railway tracks, within 50 feet of numerous people, within 20 feet of an active street, within 25 feet of numerous buildings, under an elevated pedestrian walkway, and within 100 feet of an active heliport. (*Id.*, ¶9). The Administrator alleged that Respondent has operated the aircraft in a careless or reckless manner so as to endanger the life or property of another and asserted a violation of 14 C.F.R. §91.13(a). (*Id.*, ¶11). By reason of the foregoing alleged violations, the Administrator sought to recover a $10,000.00 civil penalty pursuant to 49 U.S.C. §§46301(a)(1), 46301(d)(2), 46301(a)(5). (*Id.*, p.3).

B. The Respondent's Motion to Dismiss.

On September 27, 2013, the Respondent served a Motion to Dismiss. The Motion to Dismiss was not supported by any sworn testimony nor by an affidavit. In his Motion to Dismiss, the Respondent requested that the Administrative Law Judge (ALJ) take notice of facts that were not in reasonable dispute. (Motion to Dismiss, p.2). The general thrust of the Respondents' Motion to Dismiss involved a series of legal arguments suggesting the Administrator lacked the regulatory authority to assess a civil penalty against the Respondent for the operations of his "model aircraft." (Motion to Dismiss, pp.4 -35). Again, without the benefit of an affidavit or sworn testimony, the Respondent asserted: (1) there is no Federal Aviation Regulation governing the operation of model aircraft,[2] (2) that the FAA faces pressure due to the

[2] Motion to Dismiss at 4.

public's concern about drones,[3] (3) that FAA Internal Guidance literature was not regulatory,[4] (4) that FAA Advisory Circular AC 91-57 (1981) prevents the Administrator from enforcing a civil penalty against the operator of a model aircraft,[5] and (5) the FAA's Policy Notice published in the Federal Register did not constitute rulemaking within the ambit of 5 U.S.C. §553.[6]

To the extent the Respondent maintained in his Motion to Dismiss that FAA Advisory Circular AC 91-57 precluded civil penalty action against Respondent by the FAA, the Respondent did not testify under oath or demonstrate pursuant to Rule 56, FRCP, that there was no material question of fact that Respondent had complied with the safety protocols outlined in the Advisory Circular.[7]

C. The Administrator's Response to the Motion to Dismiss.

After the ALJ issued a Scheduling Order on October 29, 2013,[8] the Administrator filed his response to the Respondent's Motion to Dismiss on November 20, 2013 ("the Administrator's Response"). In the Administrator's Response the Administrator asserted that the FAA has the statutory and regulatory authority to regulate aircraft and that even a model aircraft is an aircraft within the purview of 49 U.S.C. §40102(a)(6), and the definition of aircraft found in 14 C.F.R. §1.1.[9] The Administrator maintained that even a model aircraft would satisfy the literal definition of an aircraft.[10] The Administrator maintained that any suggestion by Mr. Pirker that he complied with safety measures outlined in Advisory Circular AC 91-57 were not supported by

[3] *Id.* at 11.
[4] *Id.* at 15.
[5] *Id.* at 15.
[6] *Id.*, pp. 16 - 24.
[7] Indeed, it is incongruous to suggest that the safety guidelines contemplated by AC 91-57 could have been complied with in light of the allegations made in Paragraphs 8, 9 and 10 of the Complaint.
[8] Order of Judge Geraghty, October 29, 2013 ("Scheduling Order").
[9] Administrator's Response, p. 1, 2.
[10] *Id.* at 2.

any sworn testimony in the record.[11] Because there was no sworn testimony that Pirker complied with applicable safety measures under the Advisory Circular, the Administrator maintained that the Motion to Dismiss should more properly be characterized as a motion for summary judgment.[12] The Administrator then argued that since the Motion to Dismiss was, in substance, a motion for summary judgment, when construing the facts in a light most favorable to the Administrator, the Motion to Dismiss should be denied.[13]

In addition to the foregoing, the Administrator asserted a number of arguments, to-wit: (1) that his Complaint was not deficient on its face,[14] (2) that an unmanned aircraft system is an aircraft as defined in 14 C.F.R. §1.1,[15] and (3) that an unmanned aircraft system ("UAS") is an aircraft to which the prohibitions contained in 14 C.F.R. §91.13(a) applies.[16]

D. The Decisional Order.

After the Respondent submitted a Reply Memorandum of Law in support of his Motion to Dismiss dated December 10, 2013, and after the Administrator filed his Response to the Respondent's Reply on January 13, 2014, Judge Geraghty issued his Decisional Order on March 6, 2014, (the "Decisional Order"). Judge Geraghty, *without conducting an evidentiary hearing, and without receiving any sworn testimony*, either by way of affidavit, deposition or otherwise, granted the Respondent's Motion to Dismiss.[17] In his Decisional Order, the ALJ concluded: (1) that based upon FAA Advisory Circular AC 91-57, a "model aircraft" is not an "aircraft" within the purview of 49 U.S.C. §40102(a)(6) and the definition of "aircraft" found in 14 C.F.R. §1.1,[18]

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[11] *Id.* at 3.
[12] *Id.* at 3, referencing 49 C.F.R. §821.17(d).
[13] Administrator's Response at 4.
[14] *Id.* at 4.
[15] *Id.* at 5-7.
[16] *Id.* at 7-8.
[17] Decisional Order at 1-8.
[18] *Id.* at 2-4.

(2) that FAA Policy 05-01 and FAA Guidance 08-01 were not regulatory,[19] (3) that FAA Advisory Circular 91-57 undercuts the contention that a model aircraft is an aircraft,[20] and (4) FAA Notice 07-01 published in the Federal Register did not comply with the notice and rulemaking requirements set out in 5 U.S.C. §553(d).[21]

By virtue of the foregoing, Judge Geraghty found in his Decisional Order (1) that a model aircraft was not an aircraft,[22] (2) that model aircraft are only subject to voluntary compliance procedures set out in FAA Advisory Circular AC 91-57,[23] (3) that the Policy Notices 05-01 and 08-01 were for internal guidance,[24] (4) that FAA Policy Notice 07-01 did not establish a jurisdictional basis for asserting a violation of 14 C.F.R. §91.13,[25] and (5) that there was no enforceable FAA rule or regulation applicable to model aircraft classifying model aircraft as a UAS.[26] By way of a Notice of Appeal served March 7, 2014 and received in the Office of Administrative Law Judges on March 18, 2014, and received in the Offices of NTSB General Counsel on March 19, 2014, the Administrator appealed from the Decisional Order of Judge Geraghty dated March 6, 2014.

NAAA timely submits its Amicus Brief to the NTSB Office of General Counsel within thirty days of the filing of the Administrator's Appeal and is therefore timely within the ambit of 49 C.F.R. §821.48(a). As confirmed by the NAAA's Motion for Leave to File Amicus Brief submitted contemporaneous with submission of this filing, NAAA has a stake in the outcome of this litigation and prays that the NTSB consider its submission of argument on this matter of first

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[19] *Id.* at 5.
[20] *Id.* at 6.
[21] *Id.*
[22] *Id.* at 7.
[23] *Id.*
[24] *Id.* at 8.
[25] *Id.* at 8.
[26] *Id.*

impression dealing with whether the FAA has jurisdiction to sanction careless or reckless operations of model aircraft or unmanned aircraft systems in navigable airspace.

III.

Argument and Citation of Authorities

A. A Review of Legislation Illuminating the Authority of the FAA and Impacting on the Initial Decision of the ALJ in the Instant Case.

1. Vision 100-Century of Aviation Reauthorization Act.

On December 12, 2003, the United States Congress passed the Vision 100 – Century of Aviation Reauthorization Act ("the 2003 Act"), Pub. L. 108-176, 117 Stat. 2582 (2003), 49 U.S.C. §40101, Notes. In Section 709(c)(6), the Congress directed:

> The next generation air transportation system shall -- ... accommodate a wide range of aircraft operations, including airlines, air taxis, helicopters, general aviation, and *unmanned aerial vehicles*... (italics supplied).[27]

B. Enumerations of Error.

Pursuant to 49 C.F.R. §821.49, NAAA enumerates the following as enumerations of error, and it submits argument in connection with each enumeration:

1. Treating Respondent's Motion as a motion to dismiss, it was error to dismiss the Complaint.

In the event the Board finds the device was a "model aircraft," that does not exempt the Respondent from enforcement action. The Administrator alleged in paragraph10 of his Complaint that the aircraft has been operated at an altitude as high as 1,500 feet. Such operations would clearly be within navigable airspace, since " 'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and

[27] Pub. L. 108-176, Title VII, Section 709, 117 Stat. 2582 (2003), 49 C.F.R. §40101, Notes.

subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §40102(a)(32). See also 14 C.F.R. §1.1: "Navigable airspace means airspace at and above the minimum flight altitudes prescribed by or under this chapter including airspace needed for safe takeoff and landing." Without question "navigable airspace" begins at an altitude 500 feet above the surface except for over water or sparsely populated areas. 14 C.F.R. §91.119(c).

Insofar as the Complaint asserts the operation of an Unmanned Aircraft System (Complaint, ¶2), the 2003 Act contemplated the FAA's regulating unmanned aerial vehicles. 2003 Act, §706(c)(6).

It is beyond dispute that the United States Government has exclusive sovereignty of airspace of the United States. 49 U.S.C. §40103(a). On a motion to dismiss for failure to state a claim on which relief can be granted, the court must accept as true all the factual allegations in the Complaint. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009). Since the ALJ granted the motion to dismiss despite the fact the allegations in the Complaint are deemed to be true, the ALJ's Decisional Order is not in accordance with the law [49 C.F.R. §821.49(a)(2)] and constitutes prejudicial error. [49 C.F.R. §821.49(a)(4)].

2. Treating Respondent's motion as a motion for summary judgment, it was error to dismiss the Complaint.

The Respondent having failed to demonstrate by sworn testimony under Rule 56(c)(4), FRCP, that the aircraft was never operated in navigable airspace, the matter must be remanded for an evidentiary hearing on this material question of fact. As noted in the first enumeration of error, the Administrator's well-plead allegations were that the aircraft was operated at an altitude

of 1,500 feet which would be in navigable airspace.[28] The 2003 Act contemplated the FAA's regulating unmanned aerial vehicles. 2003 Act, §706(c)(6).

Since the Respondent asserted the right to have the charges against him dismissed and argued a number of facts based upon the doctrine of public notice or official notice, the Respondent's Motion to Dismiss was effectively a motion for summary judgment. Rule 12(d), FRCP. However, construing the Motion to Dismiss as a motion for summary judgment, there was no sworn testimony to support the position that the aircraft was not operated in navigable airspace.[29] Because the Respondent did not comply with his pleading obligations set forth in Rule 56(c)(4), FRCP, the findings of the ALJ were not supported by substantial evidence as required by 49 C.F.R. §821.49(a)(1). Because they were not supported by substantial evidence, prejudicial errors have occurred. 49 C.F.R. §821.49(a)(4). Because prejudicial error has occurred in this matter, the Board should remand the case for further findings by the Administrative Law Judge, and those findings must be supported by the law and by substantial evidence. See 49 C.F.R. §821.49(b). For these reasons, the Decisional Order must be reversed.

3. There was no evidence the "model aircraft" was operated in accordance with Advisory Circular AC91-57.

The Respondent is only exempt from FAA sanctions if the "model aircraft" was operated in accordance with community-based safety guidelines; and there being no evidence in the record to support this position, the Decisional Order must be reversed. As noted above in enumerations or error numbers 1 and 2, the Administrative alleged that the subject aircraft was

[28] See Comp. ¶10; 49 U.S.C. §40102(a)(32) [definition of navigable airspace]; 14 C.F.R. §1.1 [definition of navigable airspace]; 14 C.F.R. §91.119(c); 49 U.S.C. §40103(a) [granting the United States Government exclusive sovereignty over airspace of the United States.

[29] See, e.g., Rule 56(c)(4), FRCP: "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

operated at an altitude of 1,500 feet above ground level.[30] Assuming the allegations of the Complaint to be true, this would be higher than 400 feet above the surface as contemplated by FAA Advisory Circular AC 91-57. Moreover, in and to the extent the aircraft was operated at an altitude 1,500 feet above ground level, these operations were in navigable airspace.[31] Again, the 2003 Act contemplated the FAA's regulating unmanned aerial vehicles. 2003 Act, §706(c)(6).

Accepting the allegations of the Complaint as true, e.g., that the device was operated in navigable airspace and/or within 100 feet of a heliport, the Complaint should not have been dismissed. There was no sworn testimony from Respondent showing he complied with AC 91-57: (1) operated in a manner to reduce hazards; (2) selected an operating site distant from a populated area; (3) did not operate above 400 feet above the surface, (4) notified the heliport operator of his contemplated operations, and (5) used observers to help avoid collisions with manned aircraft. Accordingly, the Decision Order should be reversed for three reasons:

(a) The Decisional Order is not supported by a preponderance of substantial evidence [49 C.F.R. §821.49(a)(1)];

(b) The Decisional Order is contrary to law, precedent and policy [49 C.F.R. §821.49(a)(2)]; and/or

(c) The Decisional Order of the ALJ demonstrates prejudicial error [49 C.F.R. §821.49(a)(4)].

In light of the foregoing, the Board should reverse and remand for evidentiary proceedings the factual and legal issues raised in the instant matter. See 49 C.F.R. §821.49(b).

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[30] Comp. ¶10.

[31] See 49 U.S.C. §40102(a)(32); 14 C.F.R. §1.1 [definition of navigable airspace]; 49 U.S.C. §40103(a) [vesting exclusive sovereignty over airspace of the United States in the United States Government]; 14 C.F.R. §91.119(c) [requiring that aircraft be operated at an altitude of at least 500 feet above the surface except over sparely populated areas or over open water].

IV.

Conclusion

The NAAA, as a friend of the adjudicatory body and as an entity representing the interests of agricultural pilots who operate in a low-altitude environment, respectfully submits that the Decisional Order rendered by the ALJ must be reversed pursuant to 49 C.F.R. §821.49(b) because the findings of the ALJ are not supported by a preponderance of the evidence, the conclusions of the ALJ are not in accordance with the law and prejudicial errors have occurred. See 49 C.F.R. §821.49(a)(1), (2), (4). From a policy perspective, if the FAA does not have the capacity to sanction unsafe operations of "model aircraft" in navigable airspace, then the safety of flight of agricultural air operation (and all manned aircraft operations for that matter) is in jeopardy. Furthermore, because this case raises a question of first impression the questions on appeal are substantial within the purview of 49 C.F.R. §821.49(a)(3). In light of the foregoing, the NAAA respectfully prays that the Decisional Order rendered March 6, 2014 be reversed based upon the arguments set forth above in the Enumerations of Error, and that the Board's General Counsel respectfully give consideration to the contents of this Amicus Curie Brief.

Respectfully submitted this the 4th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Brief of the National Agricultural Aviation Association was served upon the following by facsimile transmission and United Stated Mail, postage prepaid, to the following:

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