

Ruling on Drone Regulation is Only Minor Setback for FAA

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The Federal Aviation Administration's (FAA) \$10,000 enforcement case against Raphael Pirker, whom the FAA characterized as a commercial unmanned aircraft system (UAS) operator, was dismissed on March 6, 2014, by Administrative Law Judge (ALJ) Patrick G. Geraghty. The FAA alleged that Pirker was paid by a communications company to take aerial photographs over the University of Virginia's campus using a remote UAS. The FAA charged Pirker with violating the provisions of Part 91, Section 91.13(a) of the Federal Aviation Regulations (FARs), which prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.[1]

The FAA immediately appealed the ALJ's dismissal decision to the National Transportation Safety Board (NTSB), which automatically stays in effect. The NTSB's appeal process is ongoing, and a decision is unlikely before late 2014, at the earliest.

While the ALJ's decision garnered a significant amount of press attention when it was released, it is unlikely to have a significant impact on the FAA's regulatory efforts in the long term even if it is ultimately upheld. The FAA is under a statutory mandate to enact new regulations pertaining to small UAS (under 55 pounds), and because these regulations are being adopted pursuant to the FAA Modernization and Reform Act of 2012, they are unlikely to be susceptible to the same challenges brought in the Pirker case.

Decisional Order

The ALJ issued a decisional order granting Pirker's motion to dismiss, vacating and setting aside the FAA's order of assessment and terminating the proceeding with prejudice.

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The ALJ agreed with Pirker's argument that "model aircraft" do not fall under the definition of "aircraft" under 14 CFR §1.1, and that FAR 91 therefore does not apply to the operation of "model aircraft." In support, the decision sets out four conclusions.

First, the FAA has historically in its policy notices modified the term "aircraft" by prefixing the word "model" to distinguish the device being considered. Second, to accept the FAA's argument that a model aircraft is an "aircraft" would lead to a conclusion that "aircraft" includes all types of devices/contrivances used for flight in the air. Under this logic, even a paper airplane operator would evidently be subject to the regulatory provisions of Section 91.13(a).

Third, the FAA has historically not required model aircraft operators to comply with the FARs requiring an Airworthiness and Registration Certificate for an aircraft. Fourth, the FAA issued Advisory Circular 91-57 (AC 91-57) on Model Aircraft Operating Standards, encouraging voluntary compliance with safety standards for model aircraft operators. Doing so is incompatible with the argument that model aircraft are also "aircraft" and their operators are pilots subject to the FARs.

Finally, the FAA has not deemed every device used for flight as aircraft, as evidenced by the FAA's treatment of Ultralights, which are defined in the statute not as "aircraft" but as "Ultralight Vehicle[s]" subject to a particular provision of the FARs. The ALJ thus concluded that as the FAA "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."

The decisional order also held that the FAA's various statements of policy are insufficient to impose any binding obligation on "model aircraft" operators. The ALJ determined that a 2005 memorandum on UAS policy was intended to provide internal guidance and could not bind the public. Moreover, the ALJ concluded that the FAA's 2007 "Notice of Policy," which purported to impose a ban on commercial operation of UAS, was insufficient to establish binding rules because it did not meet the criteria for valid legislative rulemaking under the Administrative Procedure Act.

The ALJ also noted that in 2012 Congress directed the FAA to develop a plan for integration of civil UAS into the national airspace. This congressional mandate includes a requirement that the FAA issue a final rule on small UAS and states that the FAA "may not promulgate any rule or regulation regarding a model aircraft" where the model aircraft satisfies the criteria stated therein. The order holds that it is a reasonable inference that the legislators were of the view that there were no effective rules or regulations governing model aircraft operations.

Having found that no binding regulations applied, the order did not reach Pirker's other arguments. For example, Pirker had also asserted that the FAA lacked jurisdiction over activities that took place at low altitudes, below what is "navigable" airspace. However, this and Pirker's other arguments may still play a role in the resolution of the case on appeal.

Procedural Next Steps

On March 7, 2014, the FAA issued a notice appealing the ALJ's decision, stating that "[t]he agency is concerned that this decision could impact the safe operation of the national airspace system and the safety of people and property on the ground." The filing of a timely notice of appeal with the board stays the effectiveness of the ALJ's order.[2]

On appeal, the board will consider only the following questions: (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?; (2) Are conclusions made in accordance with law, precedent, and policy?; (3) Are the questions on appeal substantial?; and (4) Have any prejudicial errors occurred?[3]

If the board determines that the ALJ erred in any respect, or that his or her initial decision or order should be changed, the board may make any necessary findings and may issue an order in lieu of the law judge's initial decision or order, or may remand the proceeding for any such purpose as the board may deem necessary. A party may appeal the board's decision by filing a petition in either the U.S. district court or the U.S. court of appeals.[4]

On April 7, 2014, the FAA filed its appellate brief. The FAA's brief argues that the ALJ erred in not deferring to the FAA's interpretation of the term "aircraft," and that it was also error for the ALJ to conclude that "model aircraft" are exempt from compliance with the regulatory provisions of Section 91.13. In particular, the FAA asserts that, as a matter of public policy, the "lack of clarity" in the ALJ's decision will lead to "unnecessary confusion about what type of aircraft are excluded from the definition of 'aircraft' for the purposes of enforcing the FAA's safety regulations." Finally, the FAA argues that it has the discretion to decide when to bring enforcement actions, and that the agency cannot be faulted for having promoted voluntary adherence to safety standards for "modelers" in the past.

Pirker's brief is due on May 7, 2014. There is no time limit on the NTSB for consideration of the appeal, though typically the agency takes between six and nine months to reach a decision.

Key Takeaways

The ALJ's decision provides a potential opening for using small UAS for commercial purposes, but is not a final decision and leaves key questions unresolved. Notably, the decision adopts Pirker's argument that FAR 91.13 does not apply to "model aircraft." In addition, the various policy statements the FAA has adopted over the years on UAS do not impose binding rules on "model aircraft" operations. "Model aircraft" operation is subject only to the FAA's requested voluntary compliance with the safety guidelines in AC 91-57.

Further, the decision does not define "model aircraft," leaving the scope of this potential exemption undefined. Pirker's motion to dismiss, which the ALJ granted, characterized "model airplane" as having an "obvious" "ordinary meaning." But model airplanes and UAS range in size, speed, and capabilities. The bounds of what constitutes a "model airplane" are thus ill-defined. For practical purposes, a larger, faster UAS seems more likely to attract the notice of the FAA.

One of the most important things to remember about this decision is that the FAA has appealed it. Accordingly, the decision's effectiveness is stayed until the board rules. The status quo regarding UAS has not changed. Given this stay of effectiveness, and the speed with which the FAA filed its appeal, it is likely that the FAA plans to continue to keep a close eye on UAS operations.

The agency's continued concern is underlined by the statement it released when it filed its notice of appeal, which emphasized that the FAA viewed the ALJ's decision as potentially "impact[ing] the safe operation of the national airspace system and the safety of people and property on the ground." It thus also appears likely that the FAA will continue to send cease and desist letters to commercial UAS operators during the pendency of the proceeding.

Finally, the regulatory landscape for UAS is subject to change in the near future. The 2012 FAA Modernization Act gives the FAA authority to adopt rules governing small UAS. The rulemaking will likely launch later this year. Using the congressional directive as a source of authority, the FAA can comply with APA rulemaking procedures and promulgate UAS rules that would withstand the challenges raised by Pirker. Indeed, the FAA will presumably use the rulemaking to cure the legal issues cited by the ALJ in this decision.

In sum, while this decision presents a setback to the agency's authority to regulate UAS in the short term, the FAA's long-term plans to regulate UAS are unaffected.

[1] For more information about the arguments advanced by the parties, see "Drone D-Day: How NTSB Case Could Impact FAA Authority."

[2] 49 CFR § 821.43.

[3] *Id.* § 821.49.

[4] For more information about the appeals process, see NTSB, Administrative Law Judges, http://www.ntsbgov/legal/airman_appeals.html.