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Order of NTSB Judge Raises Questions About Authority of FAA to Punish Commercial Operators of Unmanned Aerial Vehicles

Introduction.

On March 6, 2014, Judge Geraghty of the National Transportation Safety Board (NTSB) issued an Order finding that the FAA could not discipline the commercial operator of an unmanned aerial vehicle ("UAV") on the theory that the UAV was not an aircraft as the term "aircraft" has historically been defined by the FAA. The Order issued by Judge Geraghty is symptomatic of the confusion in the aviation communication about whether the FAA is regulating the commercial operations of UAVs. In contrast to the decision of Judge Geraghty, Section 336 of the FAA Modernization and Reform Act of 2012 ("the 2012 Act") requires the FAA to provide for the safe integration of Civil Unmanned Aircraft Systems into the National Airspace System as soon than practicable, but no later than September of 2015 (and 2014 for UAVs weighing less than 55 pounds). This issue of FlightWatch will examine the Order issued by Judge Geraghty, an Order from which the FAA appealed on March 7, 2014.

The Facts Giving Rise to the Action.

The FAA is vested with the statutory authority to impose civil penalties for violations of the Federal Aviation Regulations. The FAA issued an Order of Assessment on June 27, 2013 against Raphael Pirker in FAA Docket No. 2012EA210009. The FAA maintained that Mr. Pirker operated a Rite Wing Zephyr Powered Glider on October 17, 2011 in the vicinity of the University of Virginia (UVA), in Charlottesville, Virginia for compensation inasmuch as he was being paid to supply aerial photographs and video of the UVA campus and medical center. The FAA further maintained that Pirker deliberately operated the UAV at extremely low altitudes, over vehicles, buildings, people, streets and structures. More particularly, the FAA asserted that the UAV had been flown so as to require pedestrians to engage in evasive maneuvers, had been flown through a tunnel, under a crane, below treetop level along a tree lined walkway, within 15 feet of a statue, within 50 feet of railway tracks, within 50 feet of numerous individuals, within 20 feet of cars and pedestrians traveling an active street, within 25 feet of buildings, under an elevated pedestrian walkway and within 100 feet of an active heliport. The FAA maintained that Mr. Pirker had operated the UAV in a careless or reckless manner in violation of 14 CFR §91.13(a), and sought to impose a civil penalty of $10,000.00.

Pirker appealed the $10,000.00 Order of Assessment to the NTSB and filed a Motion to Dismiss claiming the UAV was a model aircraft that was unregulated by the FAA. The FAA responded to the Motion to Dismiss claiming its Order of Assessment was not deficient on its face, that the UAV was an "aircraft" as defined in 14 CFR §1.1, and that 14 CFR §91.13 (a) applies to unmanned aircraft systems.

Mr. Pirker submitted a Reply Memorandum on December 10, 2013. On January 13, 2014, the FAA submitted a Response to Pirker's Reply in Support of his Motion to Dismiss.

By March 6, 2014, the matter had been fully briefed by both parties. Accordingly, Judge Geraghty, without a hearing, sustained Pirker's Motion to Dismiss. In granting Pirker's Motion to Dismiss, Judge Geraghty noted the following:

1. That even though the device operated by Pirker could be construed as an "aircraft," historically, the FAA had modified the term "aircraft" by prefix of the word "model," to distinguish aircraft from the device/contrivance in issue in the case;

2. To extend the word aircraft to every model aircraft would lead to the conclusion that the FAA has the authority to regulate paper aircraft or toy balsa wood gliders and could subject those operators to FAA regulatory authority;

3. That in 1981, the FAA had promulgated Advisory Circular AC 91-57 dealing with model aircraft standards, and the provisions of the Advisory Circular were inconsistent with the position taken by the FAA in the Pirker case that it could regulate model aircraft;

4. While the FAA had issued two internal documents, Memorandum AFS-400, UAS Policy 05-01, September 16, 2005, and Interim Operational Approval Guidance 08-01 on March 13, 2008, both of those documents were for internal use by the FAA and both documents declared: "This policy is not meant as a substitute for any regulatory process…"; and

5. That even though the FAA published Notice 07-01 on February 13, 2007 in the Federal Register and declared the FAA position that model aircraft used for business purposes would be deemed an unmanned aircraft system and would require special airworthiness certification, nevertheless, FAA Notice 07-01 did not constitute valid legislative rulemaking (was not an NPRM) under 5 U.S.C. §553(d).

In light of the foregoing, Judge Geraghty reasoned that model aircraft are not aircraft within the purview of Section 1.1 of the Federal Aviation Regulations or 49 U.S.C. §40102(a)(6) and that model aircraft operators are subject to the FAA's voluntary compliance request set forth in AC 91-57. Judge Geraghty found that the Policy Notices No. 04-01 and 08-01 were issued for internal guidance only and that Policy Notice 07-01 published in the Federal Register did not constitute legislative rulemaking. Accordingly, Judge Geraghty concluded that the FAA did not have in place on the date in question an FAA regulation applicable to model aircraft classifying model aircraft as unmanned aircraft systems. Accordingly, the $10,000.00 civil penalty assessed by the FAA against Pirker was dismissed.

The Questions Raised by Pirker.

Since Judge Geraghty's Order has been appealed to the NTSB, it cannot be said definitively at this time that the FAA does not have in place regulatory authority to govern unmanned aircraft systems. However, with appeal briefs due on April 7, 2014, the aviation community may know fairly soon whether the FAA has the regulatory authority to control and discipline operators of commercial unmanned aircraft. Currently, there are no regulations dealing with the licensing of operators of UAVs. The operators need not be certificated. The operators need not be trained to comply with the Federal Aviation Regulations. The operators need not understand the see and avoid rule set forth in FAR §91.113(b). The operators of UAVs need not understand the right-of-way rules spelled out in FAR §91.115.

The prospects of the skies being littered with unmanned aerial vehicles weighing up to 55 pounds with no transponder, with no ADS-B, with no conspicuous paint, with no flashing light, all present the specter for collisions between manned aircraft and UAVs.

One can reasonably anticipate that the Pirker case may find its way to the United States Court of Appeals for the District of Columbia, and possibly even the United States Supreme Court. Without doubt, the decision of Judge Geraghty in *Pirker* is causing quite a stir in the aviation community.

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