

Watson
Administrative Law
Spring 1994

ORGANIC STATUTE AND IMPLEMENTING REGULATIONS

The Federal Aviation Administration Act of 1958 still serves as the cornerstone for federal regulation of air transportation, air safety, and on-ground activities affected by aviation activities. The seven sections of the original 1958 Act are set forth below:

FEDERAL AVIATION ADMINISTRATION ACT OF 1958

§1. Declaration of Policy.

In order to effectuate the national policies of (1) encouraging safety in air transportation; (2) promoting the efficient transfer of persons and goods by air; and (3) ensuring that air transportation occurs with minimal disruption of on-ground activities, the Federal Aviation Administration (FAA) is hereby created as a federal agency within the Executive Branch.

§2. Definitions.

(a) The term "Administrator" means the head of the Federal Aviation Administration, or someone appointed by the Administrator to fulfill the Administrator's duties.

(b) The term "person" includes not only individuals, but also corporations and other commercial entities.

§3. Powers of the Administrator.

(a) The Administrator is authorized to perform such acts, to conduct such investigations, and to issue such orders as he or she shall deem necessary and appropriate in light of both the public interest and the purposes of this Act.

(b) The Administrator is authorized to promulgate such regulations, after the opportunity for a hearing, as he or she shall deem necessary and appropriate in light of both the public interest and the purposes of this Act.

§4. Inspection and Search Authority.

In order to carry out his or her duties under this Act, the Administrator is authorized to enter structures where flight log records are maintained in order to inspect such records. Such inspection shall take place during regular business hours, unless prompted by an air accident or other exceptional circumstances.

§5. Prohibition on Engaging in Aviation Without Authorization.

No person may operate an aircraft without first obtaining a pilot license from the Administrator.

§6 Civil Penalties and Revocation of Pilot Licenses.

(a) Any person who violates (1) this Act; (2) any regulation promulgated pursuant to this Act; or (3) any condition of a pilot license, may be subject to

(i) a civil penalty of up to \$5,000 per violation; and/or

(ii) the revocation of the person's pilot license.

(b) An order assessing a civil penalty, or revoking a pilot license, shall be issued only after notice and an opportunity for a hearing. The initial decision on a civil penalty, or a pilot license revocation, shall be made by an Administrative Law Judge (ALJ).

(c) The ALJ's decision on either a civil penalty or a pilot license revocation may be appealed to the Administrator. If such an appeal is taken, the Administrator shall review the record and issue an order that affirms, modifies, or reverses the initial AU decision.

§7. Judicial Review.

Any person aggrieved by a regulation promulgated by the Administrator, or an order issued by the Administrator, may obtain judicial review by filing a petition with the U.S. Court of Appeals for the D.C. Circuit within two years after the promulgation of said regulation or the issuance of said order.

In addition to the 1958 FAA Act, two more recent events are relevant to the case at hand: (1) the enactment by Congress of the 1990 "Grand Canyon" Amendment to the 1958 FAA Act; and (2) the 1993 promulgation by the Administrator of "Regulations Governing FAA Civil Penalty Actions And Pilot License Revocations."

THE 1990 "GRAND CANYON" AMENDMENT TO THE 1958 FAA ACT

According to the FAA'S 1989 Report to Congress, small airplanes and helicopters made more than 200,000 flights over the Grand Canyon National Park each year from 1985 to 1988. In the peak summer

tourist seasons, as many as 50 flights each hour were conducted.

It is undisputed that air tours of the Grand Canyon provide an opportunity for people to see some of the Park resources in ways not otherwise attainable. In fact, for some, it is the only realistic way in which to gain access to, and view, the wonders of the Grand Canyon. On the other hand, those who oppose aerial sightseeing tours argue that such flights are inappropriate and incompatible with the protection of Park resources and values. For example, rafters, hikers, and other on-ground visitors to the Park assert that low-flying aircraft shatter an otherwise "profound and sacred" silence, thus diminishing the visitation experience.

In the late 1980s, a movement began to ban or significantly restrict Grand Canyon overflights. This issue came to a head in 1989 after 35 persons were killed when a plane - flying below the rim of the Grand Canyon - experienced an engine stall and crashed into the Canyon wall. One week later legislation was introduced in Congress to regulate Grand Canyon sightseeing flights.

In support of such legislation, the Administrator of the FAA, Ms. Amy Earhart, submitted the 1989 FAA Report to Congress and presented testimony. The Report recommended that the 1958 Act be amended to address (1) the safety problem posed by planes experiencing engine stalls and other engine malfunctions while engaging in sightseeing in the Canyon; and (2) the impact that such aerial sightseeing activities has on the "visitation experience" of those who view the Grand Canyon from the ground. In her testimony, Ms. Earhart went even further by stating her personal view that "the Grand Canyon should be completely off-limits to aviation."

Congress, however, declined to ban all air tours of the Grand Canyon. Instead, Congress in 1990 amended the Federal Aviation Administration Act of 1958 by adding an eighth section to the Act:

§8. Regulation of Aviation In the Grand Canyon.

(a) In view of the safety problems posed by engine stalls and other malfunctions while flying in the Grand Canyon, and in view of the adverse impact that an excessive number of Canyon overflights has on the on-ground visitation experience, the following restrictions shall apply to, and govern, aviation activities in the Grand Canyon:

(1) no one shall engage in aviation in the Grand Canyon National Park without a permit issued by the Administrator; and

(2) each permit issued by the Administrator shall limit the permittee to a maximum of three flights in the Grand Canyon per day.

(b) Any person who (1) violates the conditions of his or her permit; or (2) significantly impairs the visitation experience of those who view the Grand Canyon from the ground, may be subject to civil penalties and/or the revocation of the person's pilot license as provided for in §6 of the FAA Act of 1958.

THE 1993 REGULATIONS GOVERNING FAA CIVIL PENALTY ACTIONS AND PILOT LICENSE REVOCATIONS

The Administrator in 1992 proposed procedures to govern civil penalty actions and pilot license revocations. The proposed rule, as it was set forth in the Federal Register, is reproduced below:

"Section 6 of the FAA Act provides that '[a]n order assessing a civil penalty, or revoking a pilot license, shall be issued only after notice and an opportunity for a hearing.' This proposed rule specifies the form of the hearing provided for in §6 of the FAA Act.

Except as provided below, the procedures set forth in §§ 554, 556, and 557 of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, and 557, shall apply to §6 hearings.

It is deemed necessary and appropriate, in light of the public interest and the purposes of the FAA Act, to deviate from the requirements of §§ 554, 556, and 557 of the APA in the following two respects: the rights of a party to a §6 hearing shall not include (1) the right to present one's case by oral evidence; and (2) the right to cross-examine witnesses appearing on behalf of the FAA."

In support of the proposed rulemaking, the Administrator also included the following statement in the Federal Register:

"Differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure which have evolved from the experiences of the courts. The complete judicial model of an evidentiary hearing is neither a required, nor effective, method of decisionmaking in all circumstances. With respect to implementation of the FAA Act, the information critical to the decisions of whether to impose civil penalties, and/or revoke pilot licenses, is typically derived from documentary sources, such as the flight log records of regulated aircraft. Thus, the question of whether the Act, a FAA regulation, or a condition of a pilot license has been violated can be fairly determined without oral presentation of evidence and cross-examination. Moreover, exclusion of these procedural rights (1) advances the public interest by reducing fiscal and administrative burdens; and (2) effectuates the purposes of the FAA Act by speeding up the hearing process, which in turn hastens enforcement of the Act's prohibitions and requirements. In sum, while the rights to present oral evidence and to cross-examine witnesses, as provided in §556 (d) of the APA, may be essential to some administrative hearings, such rights are not essential to hearings conducted pursuant to §6 of the FAA Act."

Written comments on the proposed rule were received and considered during 1992 and 1993. In addition, oral comments were received at public hearings held in Washington, D.C., and Phoenix, Arizona. In the final rulemaking, published in the Federal Register in June 1993, the Administrator concluded that the rule should be issued as originally proposed. The final rule was accompanied by a lengthy explanation of the Administrator's decision, as well as responses to each comment received on the proposed rule.

THE FACT SITUATION

With the enactment of the 1990 "Grand Canyon" Amendment, many aerial sightseeing ventures experienced a reduction in business and profits. Not so with Lynn Berg, a licensed pilot who makes a living by providing air tours of the Grand Canyon. Ms. Berg responded to the 1990 Amendment in three ways. She first obtained a permit to engage in aviation in the Grand Canyon National Park as required by §8(a)(1) of the FAA Act. Second, she went deep into debt to finance the acquisition of a glider. After the enactment of the 1990 Amendment, Ms. Berg no longer flew engine-powered aircraft within the boundaries of the Grand Canyon National Park. Instead, she has a licensed pilot tow her bright orange glider to the edge of the Park and then release it. Ms. Berg pilots the glider, provides a sightseeing experience for her passengers, and then returns to her home base in Flagstaff, Arizona. Customers have responded enthusiastically to Ms. Berg's glider trips and her advertisements that "Silence is Grand in the Canyon."

Ms. Berg's third response to the 1990 Amendments was to make ten trips to the Grand Canyon per day, but to make sure that her glider never went below the rim of the Grand Canyon on more than three trips per day. In her view, the restriction in §8(a) (2) -- which limits permittees "to a maximum of three flights in the Grand Canyon per day" -- applies only to flights which dip below the rim of the Canyon. Therefore, since she only flies below the rim on three of her daily trips, she is not flying "in the Grand Canyon" on the remaining seven trips

and is thus in compliance with §8(a)(2).

As required by her pilot license, Ms. Berg records all of her trips, and the altitudes at which she flies, in her flight logs. On January 20, 1994, a representative of FAA Administrator Amy Earhart entered Ms. Berg's business office in Flagstaff and -- pursuant to §4 of the FAA Act -- demanded access to her flight log records kept in the back room. The records clearly showed that Ms. Berg had on numerous days made ten trips to the Grand Canyon, and had on each occasion flown below the Canyon rim on three of the ten trips.

On February 2, 1994, Ms. Berg received from the FAA a "Notice of Proposed Assessment of Civil Penalties and Revocation of Pilot License." In the Notice, the FAA proposed to fine Ms. Berg and revoke her pilot's license for violating her Grand Canyon permit, which pursuant to §8(a)(2) limits her "to a maximum of three flights in the Grand Canyon per day." In addition, the FAA proposed to fine Ms. Berg and revoke her pilot's license for "significantly impair[ing] the visitation experience of those who view the Grand Canyon from the ground" in violation of §8(b)(2). In support of these charges, the FAA disclosed that it would be relying on information recorded in Ms. Berg's flight logs, and on testimony from hikers who were in the Park at the same time as some of Ms. Berg's glider tours.

Ms. Berg hired a local lawyer to represent her at the hearing before the ALJ. Her lawyer denied all charges, disputed the assertion of jurisdiction by the FAA over Ms. Berg, challenged the admissibility and relevancy of the evidence and testimony relied upon by the agency, and requested the right to present oral evidence and cross-examine the FAA's witnesses. The ALJ, on May 1, 1994, rejected all such arguments and admitted the evidence and testimony offered by the FAA General Counsel. The pertinent portion of the ALJ's decision -- which found for the FAA, assessed a civil penalty, and revoked Ms. Berg's pilot license -- is set forth below:

"As a preliminary matter, Ms. Berg's request to present oral

evidence and cross—examine the FAA's witnesses is denied. Under the 1993 Regulations Governing FAA Civil Penalty Actions and Pilot License Revocations, such procedural rights are not afforded in hearings conducted under §6 of the FAA Act.

With respect to the charge that Ms. Berg's glider trips "significantly impair[ed] the visitation experience of those who view the Grand Canyon from the ground" in violation of §8(b)(2), I hold for the FAA. The agency presented two witnesses who testified that they were hiking on days that Ms. Berg conducted glider trips. The witnesses testified that they saw a "brownish" glider during their hikes, and that the glider made a "slight swooshing noise" as it passed which annoyed the hikers. Although Ms. Berg's glider is orange in color, it is more likely than not that the witnesses were mistaken about the color given the distance and speed at which the glider passed them. What is clear, however, is that a glider interfered with their hikes. This amounts to a significant impairment of their visitation experience in violation of §8(b)(2).

Ms. Berg's next argument is perhaps more compelling, but ultimately unconvincing. It is arguable that the phrase "in the Grand Canyon" in §8(a) (2) was intended to refer only to flights below the Canyon rim. However, the FAA General Counsel announced in the course of this proceeding that, in the agency's view, the underlying purposes of the FAA Act are best effectuated by interpreting the phrase "in the Grand Canyon" to encompass all flights between the walls of the Canyon, both below and above the Canyon rim. Finding nothing wrong with this interpretation, I accept it and apply it in this hearing. Since Ms. Berg's own records clearly show she flew more than three trips between the Canyon walls on numerous days, she violated her permit and §8(a)(2)."

Ms. Berg is very upset. She has fired her local lawyer and has retained you, an expert in aviation law. She does not want to take an administrative appeal of the ALJ decision to the Administrator. She is worried that, by the time the Administrator acts, it will be fall and the

lost opportunity to profit from the prime summer tourist season will cause the failure of her business. She is also convinced that there is no chance that Administrator Earhart will overturn the ALJ's decision.

Ms. Berg wants instead to go directly to federal court to overturn the ALJ's decision and get back to business as soon as possible. Because you are an expert not only in aviation law, but also in administrative law, you quickly realize that there are actually two agency actions which could possibly be challenged in the federal court: (1) the May 1994 decision of the ALJ; and (2) the promulgation of the 1993 Regulations Governing FAA Civil Penalty Actions and Pilot License Revocations.

CHALLENGE TO THE 1993 REGULATIONS

QUESTION #1 (4.2 % of exam)

Identify, and briefly discuss, the method by which you will seek judicial review of the promulgation of the 1993 Regulations Governing FAA Civil Penalty Actions and Pilot License Revocations. In other words, where will you file your lawsuit? What statutory provisions will you cite as the authority for your lawsuit?

QUESTION #2 (4.2 % of exam)

Assume for this question that the court will address your client's challenge to the 1993 Regulations. Can you argue that the 1993 Regulations are invalid for failure to comply with certain procedural requirements? Please identify and evaluate the possible arguments, if any.

[PLEASE NOTE: For purposes of this question, do not discuss any

constitutional (due process) objections that your client may have with respect to the 1993 regulations.]

CHALLENGE TO THE MAY 1994 ALJ DECISION

QUESTION #3 (4.2 % of exam)

Identify, and briefly discuss, the method by which you will seek judicial review of the May 1994 decision of the ALJ. In other words, where will you file your lawsuit? What statutory provisions will you cite as the authority for your lawsuit?

QUESTION #4 (27.4 % of exam)

With respect to your challenge to the May 1994 ALJ decision, assume that the FAA will file a motion to dismiss that focuses not on the merits, but on the availability and timing of judicial review. What possible arguments could the FAA raise in support of its motion to dismiss? Please identify and briefly evaluate the possible arguments.

QUESTION #5 (22.0 % of exam)

Assume for this question that the court has denied the FAA's motion to dismiss and will proceed to address your client's challenges to the ALJ's decision. Can you argue that the entire hearing before the ALJ was invalid for failure to comply with certain procedural requirements? Please identify and briefly evaluate the possible arguments.

(PLEASE NOTE: For purposes of this question, do not discuss any constitutional (due process) objections that your client may have with respect to the ALJ hearing.]

[PLEASE ALSO NOTE: I consider "procedural" challenges to be arguments that do not go directly to the merits of what the ALJ **decided, but** are nonetheless reasons for reversing or remanding **the ALJ's decision. It is not "absolutely fatal" if you discuss a "merits" challenge in Question #5, or a "procedural" challenge in Question #6. What is most important is that you identify and discuss the appropriate ways by which to challenge to ALJ's decision.]**

QUESTION #6 (13.5 % of exam)

Assume for this question that the court has denied the FAA's motion to dismiss and has rejected your client's challenges to the ALJ hearing based on failure to comply with procedural requirements.

You wish to challenge the ALJ's decision on substantive grounds (i. e., on its merits). Please identify and briefly evaluate the possible arguments. In addition, please note the appropriate scope of judicial review, as well as any "judge- made doctrines of judicial review" that may apply.

[PLEASE NOTE: Once again, for purposes of this question, do not discuss any constitutional (due process) objections that your client may have with respect to the ALJ hearing.]

THE PROCEDURAL DUE PROCESS CHALLENGE

QUESTION #7 (24.5 % of exam)

In this question -- and this question only -- please briefly outline and evaluate the argument that the application of the 1993 Regulations by the ALJ in the 1994 hearing violated Ms. Berg's constitutional right to procedural due process. How would you make a procedural due process argument for Ms. Berg? Do you think it would succeed?
