

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

Skydive Myrtle Beach, Inc.

Complainant/Appellant

v.

Horry County Department of Airports

Respondent



FAA Docket 16-14-05

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Skydive Myrtle Beach, Inc., (Complainant) of the Director's Determination of October 7, 2015, issued by the Director of the FAA Office of Airport Compliance and Management Analysis, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in 14 CFR part 16. The Director's Determination dismissed the Complainant's allegation of economic nondiscrimination against the Horry County Department of Airports (Respondent, or sponsor) regarding its operation of Grand Strand Airport (CRE).

The Complainant argues on appeal that the Director's findings and conclusions are "arbitrary, capricious, and not in accordance with the law since the facts and conclusions relied on by the Director: (a) violated [Complainant's] due process rights; (b) were not raised by the pleadings; (c) were not part of the administrative record provided Complainant; (d) were biased unsubstantiated self-serving statements submitted by Respondent to the Director *ex parte* in contravention to 14 CFR §§ 16.13(h) and 16.23(j); and (e) should not have been considered." [FAA Exhibit 2, Item 1, page 7]

The Complainant raises two (2) specific issues on Appeal. The issues raised were determined by the Associate Administrator to be "substantial" in accordance with 14 CFR § 16.33(e) since the Complainant challenges whether the Director followed the prescribed regulatory requirements in 14 CFR part 16 in making his Determination. The Associate Administrator determines that the two specific issues raised on appeal essentially pose the same argument with little discernable variation. [FAA Exhibit 2, Item 1, page 1] Accordingly, the Associate Administrator consolidates both of the Complainant's claims into a single issue and evaluates it accordingly.

Substantial Issue Evaluated on Appeal

1. Whether the Director's Determination relied on facts and evidence not properly submitted into the Part 16 proceedings and received *ex parte*.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator will use the following analysis:

- (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
- (2) Are conclusions made in accordance with law, precedent, and policy?
- (3) Are questions on appeal substantial?
- (4) Have any prejudicial errors occurred?

[14 CFR § 16.33(e)][*See also, e.g., Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, p. 21.]

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainant's Appeal, and the Respondent's Reply for consistency with applicable law and policy. Based on this reexamination, the FAA Associate Administrator for Airports affirms the Director's Determination. The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The Complainant's Appeal does not make persuasive arguments sufficient to reverse any portion of the Director's Determination.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR part 16.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

Skydive Myrtle Beach, Inc., an on-airport skydiving proprietor, filed a formal complaint pursuant to 14 CFR part 16 against the Horry County Department of Airports, sponsor of the Grand Strand Airport, alleging that the Respondent has engaged in unreasonably restrictive and discriminatory actions against the operator in the performance of its skydiving operations. The Director evaluated the numerous allegations against the requirements of Grant Assurance 22, *Economic Non-discrimination*, and Grant Assurance 19, *Operations and Maintenance*. In his Determination, the Director found that substantial and recurring safety concerns had arisen from the Complainant's skydiving operation. The Director concluded that the Respondent's "actions were implemented to mitigate valid and substantiated safety deficiencies" and thus "has not imposed unreasonable restrictions on or unjustly discriminated" against the Complainant, but rather has implemented mitigations that are consistent with its obligations under Grant Assurance 22(h) and (i). [Director's Determination, pg. 63-64] The Director also found that, although the Respondent has made significant efforts to mitigate unsafe skydiving operations, the fact that those unsafe operations still take place on a regular and recurring basis is grounds to compel the sponsor to take "immediate steps... up to and including closure of the DZ" in order to not be considered

to be in violation of Grant Assurance 19. [Director's Determination, pg. 66] The Director's finding under GA 19 was pre-conditioned with specific corrective actions.

III. PARTIES TO THE COMPLAINT

1. Respondent/Airport

Grand Strand Airport (CRE) is a county-owned, public-use general aviation airport located one mile northwest of the central business district of North Myrtle Beach, in Horry County, South Carolina. CRE is located in the City of North Myrtle Beach between Highway 17 Business and the Intracoastal Waterway (ICW), and close to the Atlantic Ocean shoreline. The Airport is operated by Horry County Department of Airports (Respondent, sponsor, or HCDA). HCDA is also the owner and operator of three other airports located within its jurisdiction, including Myrtle Beach International Airport (MYR), Conway Horry County Airport (HYW), and Twin City Airport (5J9). [Director's Determination, pg. 4]

CRE covers an area of 427 acres and has one runway designated 5/23 with an asphalt surface measuring 5,997 by 100 feet. For the 12-month period ending March 11, 2015, the airport had 46,670 aircraft operations and approximately 60 based aircraft. CRE has a designated parachuting landing zone (Drop Zone or DZ) on airport property, which is adjacent to the airport's runway and taxiway system. It also has an operational contract ATCT, and thus is classified as Class D airspace when the tower is in operation. [Director's Determination, pg. 4]

Partial funding for most major capital improvements for the County's airports, including CRE, is obtained through the FAA and from the South Carolina Division of Aeronautics. The development of the Airport was financed, in part, with FAA Airport and Improvement Program (AIP) funding, authorized by the *Airport and Airway Improvement Act of 1982*, as amended, 49 U.S.C. 47101, et seq. Under the provisions of this Act, the County is obligated to comply with the FAA sponsor grant assurances and related Federal law, 49 U.S.C. 47107. Since 1982, the County has accepted 19 AIP grants for CRE totaling over \$10.5 million. [Director's Determination, pg. 4]

2. The Complainant

Complainant, Skydive Myrtle Beach (SDMB), located at CRE, is a commercial skydiving operator that engages in the air transportation of individuals for the purpose of skydiving, instruction in skydiving, and rental and sales of skydiving equipment. SDMB currently uses CRE as a base of operations for its skydiving business and also uses CRE's designated DZ. [Director's Determination, pg. 4]

IV. PROCEDURAL HISTORY

On October 07, 2015, the Director issued the Director's Determination in this matter.

On November 7, 2015, the Complainant filed its Appeal from the Director's Determination. [FAA Exhibit 2, Item 1]

On November 24, 2015, the Respondent filed its Reply to Complainant Skydive Myrtle Beach, Inc.'s Appeal of the Director's Determination. [FAA Exhibit 3, Item 1]

V. APPLICABLE FEDERAL LAW AND FAA POLICY

Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22 requires, in part, that the sponsor of a federally obligated airport assure:

- a. It will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.
- h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport...
- i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when they appear to deny or limit access to, or use of, the airport.

VI. PRELIMINARY ISSUES

Before addressing the issues raised on appeal, the Associate Administrator discusses several preliminary issues raised by the Complainant’s appeal.

First, the Complainant broadly asserts that the Director’s Determination was unconstitutional. The FAA does not have jurisdiction over allegations of violations of the Constitution of the United States under 14 CFR part 16, or otherwise, and therefore dismisses that claim. The Associate Administrator evaluates the issues consistent with his authority and the standard set forth in 14 CFR § 16.33. [*See Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority*, FAA Docket No. 16-07-16, (February 27, 2009) (Director’s Determination), page 18.]

Second, the Complainant indirectly asserts the Director’s Determination was defective for not considering alleged violations of the Anti-Head Tax Act (49 U.S.C. § 40116(b)). [FAA Exhibit 2, Item 1, pg. 10] Section 16.33(f) allows a party to raise new arguments on Appeal, but only if accompanied by a petition showing good cause as to why the new issue or evidence was not

presented to the Director. The Complainant made no effort to satisfy the foregoing requirements, and the Associate Administrator dismisses that argument.

Finally, the Complainant attaches an appendix to its brief on appeal that contains a number of documents dated after the Director's Determination was issued. [FAA Exhibit 2, Item 2] The Complainant's brief also discusses facts that occurred after the Director's Determination was issued. The Complainant did not petition for inclusion of this information or make a showing of good cause to include it as required under 14 CFR § 16.33(f). Accordingly, this evidence is not considered by the Associate Administrator in this Final Agency Decision.

VII. ISSUES ON APPEAL

The Complainant raised the following two (2) issues on Appeal:

1. Did the FAA violate the Complainant's due process rights when it received evidence *ex parte* from the Respondent and refused the Complainant's FOIA requests for all documents in FAA possession relating to skydiving operations at CRE?
2. Was the FAA Director's Determination arbitrary, capricious and an abuse of discretion in violation of the 5th Amendment Due Process Clause of the United States Constitution, 5 USC § 557(d) of the Administrative Procedures Act, and 14 CFR § 16.303 when it relied on facts and evidence not properly submitted into the Part 16 proceedings and received *ex parte*?

[FAA Exhibit 2, Item 1, pg. 1]

The Complainant argues that the Director's findings and conclusions are "arbitrary, capricious, and not in accordance with the law since the facts and conclusions relied on by the Director: (a) violated [Complainant's] due process rights; (b) were not raised by the pleadings; (c) were not part of the administrative record provided Complainant; (d) were biased unsubstantiated self-serving statements submitted by Respondent to the Director *ex parte* in contravention to 14 CFR §§ 16.13(h) and 16.23(j); and (e) should not have been considered." [FAA Exhibit 2, Item 1, page 7]

The Associate Administrator determines that the two issues raised on appeal essentially pose the same argument. [FAA Exhibit 2, Item 1, page 1] Accordingly, the Associate Administrator consolidates the issues and evaluates them as a single issue below.

ISSUE: Whether the Director's Determination relied on facts and evidence not properly submitted into the part 16 proceeding and received *ex parte*.

The Complainant argues that the Director, in making his Determination under part 16, improperly relied on prohibited *ex parte* communications and inquiries from the FAA to the Respondent, from the Respondent to the FAA, and internal communications between the Director and other FAA offices. [FAA Exhibit 2, Item 1, pg. 4-5] The Complainant cites a number of federal statutes, laws,

and court precedents¹ to support its overarching argument that *ex parte* communications are relevant to the merits of a proceeding between the Complainant, Respondent, and an agency decision-maker and that, in this case, the Director was provided *ex parte* communications that the Complainant was never given the opportunity to evaluate and respond to. [FAA Exhibit 2, Item 1, pg. 8]

Specifically, the Complainant argues that “none” of the “safety incidents” relied upon in the Director’s Determination “have ever been presented” to the Complainant. [FAA Exhibit 2, Item 1, pg. 8] The Complainant also argues that at least “five *ex parte* communications with FAA employees” have resulted in “at least 93 ‘safety incident’ reports, letters of inquiry, safety data, and memoranda that have never been provided” to the Complainant but relied on the Director. [FAA Exhibit 2, Item 1, pg. 10] Lastly, the Complainant argues that none of the cited safety incidents “referred to any statutory, regulatory, or county violation” and that each of the incident reports received by the FAA “was generated after the initiation of the Part 16 proceedings” by the Respondent and/or the airport air traffic control tower (ATCT). Consequently, the Complainant claims that reported incidents “were anecdotal, inherently biased, and unreliable.” [FAA Exhibit 2, Item 1, pg. 9] Based on these allegations, the Complainant’s Appeal requests the Associate Administrator to vacate the Director’s Determination and find the Respondent in violation of Grant Assurance 22, *Economic Nondiscrimination*.

For its part, the Respondent argues that: 1) the Complainant failed to state an appealable issue under 14 CFR § 16.33(e), 2) the four available grounds for evaluating an appeal under 14 CFR § 16.33(e) affirm the Director’s Determination, and 3) new issues and evidence in the Appeal should not be considered by the Associate Administrator. [FAA Exhibit 3, Item 1, pgs. 2-3]

Regarding *ex parte* communications, the Associate Administrator reviewed 14 CFR § 16.301, *Prohibited Ex Parte Communications* in totality to evaluate the merits of the Complainant’s claims under appeal. Section 16.301(a) and (b) provides that:

(a) The prohibitions of this section **shall apply from the time a proceeding is noticed for hearing** [emphasis added] unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge.

(b) Except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No interested person outside the FAA and no FAA employee participating as a party shall make or knowingly cause to be made to any decisional employee an *ex parte* communication relevant to the merits of the proceeding;

¹ The Complainant cites, among others, *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority* (685 F.2d 547, 565 (C.A.D.C. 1982); Public Law No. 94-409, *Government in the Sunshine Act* § 4(a), 90 Stat. 1241 (1976); and 5 U.S.C. § 557(d)(1)(A), *Administrative Procedure Act*.

(2) No FAA employee shall make or knowingly cause to be made to any interested person outside the FAA an *ex parte* communication relevant to the merits of the proceeding; or

(3) Ex parte communications regarding solely matters of agency procedure or practice are not prohibited by this section.

Upon review, the Associate Administrator concludes that the Complainant has misinterpreted 14 CFR § 16.301. A party raising a defense under § 16.301 would have to show that an *ex parte* communication was made to a “decisional employee” after the case was “noticed for hearing.” A “decisional employee” is “the Administrator, Deputy Administrator, Associate Administrator, Director, hearing officer, or other FAA employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding.” [14 CFR § 16.3] This part 16 proceeding has not been and is not subject to a hearing, consistent with 14 CFR § 16.109, and therefore § 16.301 does not apply. Nevertheless, in order to provide a fair and complete consideration of the issues before the agency, the FAA generally avoids *ex parte* communications during the entire part 16 proceeding. Especially at the initial determination stage, the Director must balance *ex parte* concerns, which may provide one party with an unfair advantage, against the investigatory responsibilities in determining whether a grant assurance violation exists.

A formal investigation by the Director includes a “review of the written submissions or pleadings of the parties, as supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties at FAA request.” [14 CFR § 16.29(b)(1)] Section 16.29(b)(2) provides direct authority for the Director to obtain “additional oral and documentary evidence” for use in the FAA’s investigation. Lastly, 14 CFR § 16.31(a) provides that the FAA will issue its determination “[a]fter consideration of the pleadings *and any other information obtained by the FAA after investigation.*” [Emphasis added]

The FAA evaluated the various internal and external correspondence that the Complainant argues constitutes inappropriate *ex parte* communications between the FAA and the Respondent, including:

- April 7, 2015 letter from the FAA Southern Region Airport’s Division to the Respondent
- April 27, 2015 letter from the Respondent in reply to the FAA letter of April 7, 2015
- July 31, 2015 internal FAA memorandum from FAA FSDO 13 to FAA ASO-200
- August 4, 2015 internal FAA memorandum from FAA ATO to FAA EJT-ES
- CRE Safety Incident data compiled by the Director (ACO-100)
- September 1, 2015 letter from FAA AAS-1 (Safety and Standards) to the Respondent
- September 17, 2015 letter from Respondent in reply to AAS letter of September 1, 2015
- September 30, 2015 letter from Respondent to AAS-1

[FAA Exhibit 2, Item 1, pgs. 4-5]

Upon review, it is clear that in each letter and inquiry, the FAA exercised its statutory and regulatory duties to investigate known or potentially unsafe operations at CRE and/or to

communicate such concerns internally with appropriate FAA stakeholders. Moreover, when the alleged denial of access was based on unsafe conditions, those unsafe conditions are a reasonable basis for further investigation under 14 CFR § 16.29. The results of this investigation were then included in the administrative record. The part 16 procedures for appealing a Director's Determination permit the parties to reply to those portions of the record.

The Complainant also argues that the incident data reported by the Respondent and incorporated into the Director's Determination constituted an improper *ex parte* communication involving the merits of the case. [FAA Exhibit 2, Item 1, pg. 7] The Associate Administrator disagrees. The Director's purview in a part 16 proceeding is to protect the Federal interest in a federally funded airport; therefore, the Complainant's view of the part 16 procedures would limit the ability of the FAA to perform formal/informal investigations, to communicate internally, and/or to communicate with an airport sponsor (or complainant) who has a pending matter under part 16. While an FAA investigation of an airport sponsor may be related to the merits of an ongoing proceeding under part 16, the various components of an investigation do not themselves constitute a prohibited *ex parte* communication. Again, the results of this investigation were included in the record, and thus provide an opportunity for the parties to respond under the part 16 appeal procedures.

The Director, in the role of neutral and objective adjudicator, may consider the totality of the data and/or conclusions of an informal FAA investigation, even if the data are not included in the original pleadings of the case. [§ 16.29(b)(1)] The Associate Administrator notes, however, that the Director will include in the public record all information, data, and communications collected and used in the part 16 deliberative process in order demonstrate a fair and complete consideration of the issues. [§ 16.11] Although the Complainant had the opportunity in its appeal to produce persuasive evidence in opposition to that evidence resulting from the Director's investigation, or to argue the Director's conclusions were inconsistent with the evidence in the record, the Complainant made no such production or arguments. On review, the Associate Administrator concludes all evidence was properly included in the administrative record and supportive of the Director's findings.

In consideration of the foregoing, the Associate Administrator rejects the Complainant's argument that the Director relied on improper *ex parte* communications, facts, and evidence in making his formal Determination. Likewise, the Associate Administrator concludes that the Director's Determination under Grant Assurance 22 is not arbitrary, capricious or an abuse of discretion. The Director's findings are supported by reliable, probative, and substantial evidence and are made in accordance with applicable law, precedent, and policy. The Associate Administrator upholds the Director's finding under Grant Assurance 22, *Economic Nondiscrimination*.

VIII. CONCLUSION

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator will use the following analysis:

- (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?

- (2) Are conclusions made in accordance with law, precedent, and policy?
- (3) Are questions on appeal substantial?
- (4) Have any prejudicial errors occurred?

14 CFR § 16.33(e); *see also, e.g., Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, p. 21.

In arriving at a final decision in this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Appeal, and Reply submitted by the parties, and applicable law and policy. Based on this reexamination, this decision concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy.

The Director's Determination is affirmed. This decision constitutes a final decision of the Associate Administrator pursuant to 14 CFR § 16.33.

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the Final Decision and Order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Agency Decision has been served on the party. [14 CFR§ 16.247(a)]



Eduardo A. Angeles
Associate Administrator for Airports



Date