

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

Rick Aviation, Inc.

COMPLAINANT/APPELLANT

v.

Peninsula Airport Commission

RESPONDENT/APPELLEE

Docket No. 16-05-18

November 6, 2007

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Rick Aviation, Inc. (Complainant or Appellant) from the Director's Determination of May 8, 2007, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR) Part 16 (FAA Rules of Practice).

Complainant argues on appeal to the Associate Administrator for Airports that the Director committed errors in conducting the investigation and interpreting the evidence, causing the FAA to dismiss the Complaint erroneously. Complainant argues on appeal the Director erred in concluding the Respondent is not currently in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, by (a) applying its Airport minimum standards in an allegedly inequitable manner, and by (b) taking legal action to evict Complainant as a tenant on the Airport. [FAA Exhibit 1, Item 11, pages 1 and 3.] The Complainant alleges these errors caused the FAA to dismiss the Complaint erroneously. The Complainant also asks the FAA to stay its final decision and order in this Part 16 proceeding until an underlying lease dispute between Complainant and Respondent is resolved in state court.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. *Ricks v Millington Municipal Airport*, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR, Part 16, § 16.227.]

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 and the appeal and reply submitted by the parties in light of applicable law and policy. Based on this reexamination, the FAA 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 appeal does not contain 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 § 16.33(a).

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In its initial complaint, Complainant alleged Respondent violated its federal obligations by (a) permitting a competitor, Mercury Air Centers, to operate without complying with the applicable minimum standards while Complainant was required to meet applicable minimum standards (*Issue 1*); (b) providing substantially more favorable lease terms to Mercury Air Centers (*Issue 2*); and (c) taking action to prevent Complainant from providing services that Complainant is permitted to provide under its lease in retaliation for complaining about the favorable treatment afforded to Mercury Air Centers (*Issue 3*). The Director reviewed the allegations to determine whether the Respondent was currently in violation of its federal obligations regarding grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*.

Under *Issue 1*, the Director found the record did not support Complainant's allegation that Mercury Air Centers was not required to comply with the appropriate minimum standards or that Complainant was held to more stringent requirements than Mercury Air Centers. The Director found the record did not contain evidence that the Respondent denied Complainant similar treatment that was afforded to Mercury Air Centers. [See FAA Exhibit 1, Item 10, *Director's Determination*, pages 18-27.]

Under *Issue 2*, the Director found the lease terms in Complainant's 1984 lease were different from the lease terms in Mercury Air Centers' 2004 lease, including different option period terms and different payment structures. Given the twenty-year time span between the two leases, the Director found it was not unreasonable that the terms would be structured differently to reflect changing circumstances affecting civil aviation over time. As the Director noted, airport sponsors may change lease terms, rates, and conditions of occupancy in order to balance the various legitimate interests of the public, including improved business practices. The Director found no evidence that the Respondent acted contrary to its federal obligations regarding the different lease terms. [See FAA Exhibit 1, Item 10, *Director's Determination*, pages 27-35.]

Under *Issue 3*, the Director found no incidents of unreasonable denial of access or unjust economic discrimination regarding Complainant's allegation that it was denied the

opportunity to provide certain services. In addition, the Director found the Complainant's allegation that the Respondent conducted retaliatory audits of Complainant's business was neither supported by the evidence nor relevant to the Respondent's compliance with its federal obligations. [See FAA Exhibit 1, Item 10, *Director's Determination*, pages 35-42.]

The Director dismissed the Complaint. [See FAA Exhibit 1, Item 10, *Director's Determination*, page 44.]

III. THE AIRPORT

The Newport News/Williamsburg International Airport (Airport) is a public-use airport located in Newport News, Virginia. The Peninsula Airport Commission (PAC) owns the Airport and is the sponsor for federal grants. The development of the Airport has been financed, in part, with funds provided to the Peninsula Airport Commission as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 United States Code (U.S.C.) § 47101, *et seq.* [FAA Exhibit 1, Item 8.] As a result, the Peninsula Airport Commission is obligated to comply with the FAA sponsor assurances and related federal law, 49 U.S.C. § 47107. The Peninsula Airport Commission is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153. The Peninsula Airport Commission is the Respondent or Appellant in this Part 16 case.

IV. FACTUAL BACKGROUND and PROCEDURAL HISTORY

The Director's Determination includes a detailed factual background section. [See FAA Exhibit 1, Item 10, *Director's Determination*, pages 2-10.] In this Final Decision and Order, we have listed only the procedural history for this Part 16 Complaint and appeal.

On November 4, 2005, Complainant Rick Aviation, Inc, filed a formal Complaint pursuant to Part 16. [FAA Exhibit 1, Item 1, *Complaint*.]

On December 22, 2005, counsel to Respondent submitted its Answer and Motion to Dismiss filed on behalf of the Peninsula Airport Commission. [FAA Exhibit 1, Item 4, *Answer*.]

On January 20, 2006, counsel to Complainant submitted its Opposition to Respondent's Motion to Dismiss and its Reply Memorandum of Law in Support of its Complaint. [FAA Exhibit 1, Item 5, *Reply*.]

On February 3, 2006, counsel to Respondent submitted its Rebuttal to Complainant's Brief in Opposition to Respondent's Motion to Dismiss. [FAA Exhibit 1, Item 7, *Rebuttal*.]

On May 8, 2007, the Director, FAA Office of Airport Safety and Standards, issued his determination. [FAA Exhibit 1, Item 10, *Director's Determination*.]

On June 6, 2007, Complainant Rick Aviation, Inc. filed its appeal from the Director's

Determination. [FAA Exhibit 1, Item 11, *Appeal*.]

On June 25, 2007, counsel to Respondent submitted its Reply to Complainant's appeal from the Director's Determination. [FAA Exhibit 1, Item 12, *Reply*.]

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and surplus federal property to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq.* This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable federal laws, regulations, executive orders, statute-based assurances, and other requirements binding the sponsor upon acceptance of the federal assistance. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances and restrictive covenants in property deeds and conveyance instruments.

A. The Airport Sponsor Assurances and Deed Covenants

The AAIA, 49 U.S.C. § 47107, et seq., sets forth assurances to which an airport sponsor receiving federal financial assistance must agree as a condition precedent to receipt of such assistance. Pursuant to 49 U.S.C. § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 U.S.C. § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, *Sponsor's Obligations*. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the federal government.

In this case, the Respondent is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C. §§ 47151 through 47153. A Surplus Property Deed provides, in relevant part, that “. . . the property transferred hereby . . . shall be used for public airport purposes, and only for such purposes, on reasonable terms and without unjust

discrimination.” These deed covenants are the same as the federal grant assurances discussed below and that are also imposed upon the City. Our analysis and enforcement of the obligations is identical.

1. Federal Grant Assurance 22, Economic Nondiscrimination

Federal grant assurance 22, *Economic Nondiscrimination*, deals with the sponsor's obligation to make the airport available for aeronautical use on reasonable and not unjustly discriminatory terms.

Grant assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

...will make its 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. [Assurance 22(a).]

...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. [Assurance 22(h).]

...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. [Assurance 22(i).]

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, which would be detrimental to the civil aviation needs of the public.

The grant assurance specifically addresses the issue of the treatment of fixed-base operators (FBOs), stating that “Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.” [Assurance 22(c).] Subsection (c) specifies the application of subsection (a) to the treatment of fixed-base operators providing additional specific guidance as to the sponsor obligations.

The Order describes the responsibilities under grant assurance 22, *Economic Nondiscrimination*, assumed by the owners of public-use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport, and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See Order, Sections 4-14(a)(2) and 3-1.]

The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [See Order, Section 3-8(a).]

2. Federal Grant Assurance 23, Exclusive Rights

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.” An “air navigation facility” includes an “airport.” [See 49 U.S.C. §§ 40102(a) (4), (9), (28).]

Section 511(a)(2) of the AAIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that “there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.”

Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport:

“... will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...”

In the Order, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See Order, Section 3-9(e).]

B. The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports that airport sponsors operate in a manner consistent with their federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights that airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property to ensure that airport sponsors serve the public interest.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. The Order provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving federal funds or federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates the interpretation of grant assurances by FAA personnel.

1. The Complaint Process

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, § 16.23(b)(3,4).]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and federal case law. The APA provision states, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” [5 U.S.C. § 556(d).] [*See also, Director, Office of Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *Air Canada et al. v. Department of Transportation*, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires that the complainant submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that “[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.”

2. Right to Appeal the Director’s Determination

A party to the Complaint adversely affected by the Director’s Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director’s

Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, § 16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, § 16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. Under Part 16, Complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [See Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 21; and 14 CFR, Part 16, § 16.227.]

VI. ANALYSIS AND DISCUSSION

Upon consideration of the Complaint from the Complainant, filed with the FAA November 4, 2005, the Director of the Office of Airport Safety and Standards determined that the Respondent is not currently in violation of its federal obligations under grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, regarding the issues argued in the Complaint.

On appeal, Complainant alleges the Director made errors in interpreting the evidence and making conclusions from the evidence. Complainant alleges the Director erred in concluding the Respondent is not currently in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, by (a) applying its Airport minimum standards in an allegedly inequitable manner, and by (b) taking legal action to evict Complainant as a tenant on the

Airport. [FAA Exhibit 1, Item 11, pages 1 and 3.] The Complainant alleges these errors caused the FAA to dismiss the Complaint erroneously.

In addition, Complainant asks the FAA to stay its final decision and order in this Part 16 proceeding for several months until the underlying lease dispute between Complainant and Respondent is resolved in state court. [FAA Exhibit 1, Item 11, pages 5-6.]

A. Airport Minimum Standards

The Complainant alleges on appeal the Director erred in concluding the Respondent is not currently in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, by applying its Airport minimum standards in an allegedly inequitable manner. [FAA Exhibit 1, Item 11, page 1.]

The administrative record contains three sets of Airport minimum standards: the first set is from 1984, the second set is a revision in 1994, and the third set is the latest revision in 1996. While each set contains at least some different requirements to be met by general fixed-base operators, many of the requirements remain the same throughout the three sets of minimum standards. (*See* Table 1 on the following page for examples.)

The 1984 Airport minimum standards were in effect at the time Complainant signed its lease with the Respondent. The 1996 Airport minimum standards were in effect at the time Complainant's competitor, Mercury Air Centers, signed its lease with the Respondent. Complainant asserts that while Mercury Air Centers is subject to the 1996 minimum standards, the Complainant is subject only to the Airport minimum standards in effect on October 18, 1984, stating Complainant was specifically exempted from meeting the revised standards implemented in 1994 and 1996. [FAA Exhibit 1, Item 4, exhibit 10, page 1.]

In the Complaint, Complainant argued the Respondent permitted Mercury Air Centers to operate without complying with the minimum standards [FAA Exhibit 1, Item 1, page 1] yet required Complainant to comply with the minimum standards [*see* FAA Exhibit 1, Item 1, page 3]. In reviewing this issue, the Director considered whether the Respondent enforced its minimum standards in regard to competing fixed-base operators in a manner that is unjustly discriminatory. [FAA Exhibit 1, Item 10, *Director's Determination*, page 16.]

The Director determined Respondent did not enforce its minimum standards in regard to competing fixed-based operations at the Airport in a manner that unjustly discriminated against the Complainant. The Director found the record evidence did not support Complainant's contention that Mercury Air Centers was in noncompliance with the applicable minimum standards. The Director noted the Respondent had reasonably instituted a program to enforce the Airport minimum standards. The Director also found the administrative record did not support Complainant's contention that the Complainant suffered disparate treatment. [*See* FAA Exhibit 1, Item 10, *Director's Determination*, Issue One.]

Table 1: Airport Minimum Standards for General Fixed-Base Operators

Requirement	1984 standards [FAA Exhibit 1, Item 3, exhibit 3]	1994 standards [FAA Exhibit 1, Item 3, exhibit 4]	1996 standards [FAA Exhibit 1, Item 3, exhibit 5]
<i>Hours of Service for Fuel Sales</i> ¹	6:00 a.m. to midnight daily	6:00 a.m. to midnight daily	6:00 a.m. to midnight daily
<i>Hours of Service for Maintenance and Repair</i>	8:00 a.m. to 5:00 p.m. five days a week	8:00 a.m. to 5:00 p.m. five days a week	8:00 a.m. to 5:00 p.m. five days a week
<i>Stand-by Hours of Service</i>	Capability to perform minor repairs on a stand-by basis during hours maintenance and repair facilities are closed.	Capability to perform minor repairs on a stand-by basis during hours maintenance and repair facilities are closed.	Capability to perform minor repairs on a stand-by basis during hours maintenance and repair facilities are closed.
<i>Capital Investment</i>	\$425,000 or more in fixed assets for aviation purposes.	Amount not specified.	Amount not specified.
<i>Floor Space: General Fixed-base Operator</i>	Not specified	21,500 square feet	21,500 square feet
<i>Hangar Space</i>	Sufficient size and dimensions to accommodate maintenance and repair services for aircraft normally frequenting the airport.	Sufficient size and dimensions to accommodate maintenance and repair services for aircraft normally frequenting the airport.	Sufficient size and dimensions to accommodate maintenance and repair services for aircraft normally frequenting the airport.
<i>Flight Instruction</i>	Any flight training program shall be FAA approved. ²	All flight training programs shall be approved by the FAA under Part 141 as current or amended.	All flight training programs shall be approved by the FAA under Part 141 as current or amended.
<i>Application of Standards</i>	Not applicable to fixed-base operators with a current lease; will apply after lease expires or operator increases or expands its services.	Not applicable to fixed-base operators with a current lease; will apply after lease expires or operator increases or expands its services.	Not specified.

¹ The 1984, 1994, and 1996 Airport minimum standards all state service will be available between the hours of 6:00 a.m. and 12:00 p.m. daily. We have interpreted 12:00 p.m. to mean midnight as opposed to noon.

² Only flight training programs operated under Federal Aviation Regulations (FAR) Part 141 are considered “FAA-approved schools.”

On appeal, the Complainant reiterates its position that the Respondent is applying its Airport minimum standards in an allegedly inequitable manner. The Complainant states:

When an airport treats two [fixed-base operators] inequitably, it is axiomatic that it is economically discriminating against one of those [fixed-base operators]. The Director's Determination indicates that differences in application of minimum standards are sometimes permissible, but that they amount to a matter of discretion and degree. The issue for this appeal is whether the differences in the Airport's treatment and requirements of the two [fixed-based operators] here constitutes economic discrimination. [FAA Exhibit 1, Item 11, page 1.]

The appeal does not identify any area where the Director erred in concluding the record evidence does not support Complainant's allegation that Mercury Air Centers is in noncompliance with the Airport minimum standards. The appeal does not provide any argument to suggest the Director erred in concluding the Respondent has implemented a program to enforce its own minimum standards.

Rather, the appeal points to legal action taken by the Respondent against the Complainant³ and challenges the Director's conclusions regarding the Complainant's compliance with Airport minimum standards on (1) leased space and (2) its flight training program. Complainant argues on appeal that Mercury Air Centers had an opportunity to cure its minimum standard deficiencies while Complainant was provided no reasonable opportunity to cure its violations on its flight training program before the Respondent took action. [FAA Exhibit 1, Item 11, pages 3-4.]

1. Leased Space

Complainant alleges on appeal that the Director erred in concluding Complainant's square footage of leased space was deficient without acknowledging that Respondent took space from the Complainant and gave it to Mercury Air Centers in violation of grant assurance 22, *Economic Nondiscrimination*. Complainant also argues on appeal that the Director erred in concluding a sublease to Hampton University for an aviation program was not related to the Complainant's fixed-base operator services. [FAA Exhibit 1, Item 11, page 4.]

Deficient Floor Space

Complainant was approved as a general fixed-base operator (upgraded from a specialized fixed-base operator) July 15, 1993. [FAA Exhibit 1, Item 3, exhibit 2.] Both the 1996 and 1994 Airport minimum standards require a general fixed-base operator to maintain 110,000 square feet of land and 21,500 square feet of building floor space. [FAA Exhibit 1, Item 3, exhibit 4, *1994 minimum standards*, page 2; and exhibit 5, *1996 minimum standards*, page 3.] The 1984 minimum standards do not specify minimum floor space or minimum land space. [See FAA Exhibit 1, Item 3, exhibit 3, *1984 minimum standards*.]

³ Legal actions taken by the Respondent against the Complainant are discussed in this document under *Issue B, Termination and Eviction*.

Table 2: Leased Floor Space Requirements Stated in Airport Minimum Standards

Applicable Minimum Standards	Floor Space	Administrative Record Reference
1996 Minimum Standards	21,500 square feet	[FAA Exhibit 1, Item 3, exhibit 5, page 3.]
1994 Minimum Standards	21,500 square feet	[FAA Exhibit 1, Item 3, exhibit 4, page 2.]
1984 Minimum Standards	Not specified.	[FAA Exhibit 1, Item 3, exhibit 3.]

At this point, it is essential to clarify which set of minimum standards the FAA is applying to the Complainant in reviewing this Part 16 Complaint. The Director identified the 1996 Airport minimum standards in stating the Complainant was not maintaining sufficient square footage of floor space. [FAA Exhibit 1, Item 10, *Director’s Determination*, page 19.] Complainant’s appeal does not dispute that the 1996 minimum standards are the appropriate standards to apply. Even while asserting that it is subject only to the 1984 minimum standards, the Complainant does state it is in “full compliance with the 1996 minimum standards.” [FAA Exhibit 1, Item 5, page 3.] As noted by the Director, the Complainant does not allege that the Respondent’s application of the 1996 minimum standards to the Complainant is a grant assurance violation. [See FAA Exhibit 1, Item 10, *Director’s Determination*, page 6, footnote #5.] In addition, the administrative record confirms that while the 1984 and 1994 Airport minimum standards did exempt existing fixed-base operators from meeting the revised standards, the 1996 Airport minimum standards contain no such exemption. [See FAA Exhibit 1, Item 7, page 3; and Item 3, exhibits 3, 4, and 5.] The FAA will continue to apply the 1996 Airport minimum standards to the Complainant while reviewing this Part 16 Complaint.

Based on the 1996 Airport minimum standards, the Complainant is required to maintain 21,500 square feet of leased floor space for its fixed-base operation.

The Respondent acknowledges that the Complainant leased 40,276 square feet of building space, but stated 23,200 square feet were contained in a hangar completely sublet to Hampton University for a program that did not provide any services required by the minimum standards. That left 17,076 square feet of space dedicated to Complainant’s fixed-base operation, which was 4,424 square feet less than the 21,500 square feet required under the minimum standards. [FAA Exhibit 1, Item 4, page 9.]

Complainant argued unsuccessfully that the 23,200 square foot hangar it subleased to Hampton University should be included in the Complainant’s total leasehold for meeting the minimum standards. [FAA Exhibit 1, Item 5, page 6.] The Director noted that the sublease to Hampton University had no connection to the Complainant’s fixed-base operation and determined the space included in the Hampton University sublease should not be counted as part of the Complainant’s minimum leasing requirements for fixed-base operator activities while occupied by Hampton University. [FAA Exhibit 1, Item 10, *Director’s Determination*, page 20.] In its appeal, Complainant again asserts that the Hampton University sublease should be included in the Complainant’s leasehold total because the Hampton University property was being used by Hampton University for an aviation program. [FAA Exhibit 1, Item 11, page 4.]

On August 8, 2007, we contacted the Hampton University Aerospace Center at (757) 872-6700 to inquire about the aviation program it operated on the Airport under its sublease with the Complainant and to determine whether any of the services provided by Hampton University were consistent with the fixed-base operator minimum standard requirements of the Complainant. We learned the Hampton University program is an aircraft maintenance school. It has always been an aircraft maintenance school.⁴ [See FAA Exhibit 1, Item 14.] This is not an activity related to fixed-base operator services. The 1984, 1994, and 1996 Airport minimum standards neither call for nor address a requirement to offer an aircraft maintenance school.

The Associate Administrator concurs with the Director that the Hampton University sublease is for a separate activity unrelated to the Complainant's fixed-base operator required activities. The subleased property occupied by Hampton University was not part of the Complainant's fixed-base operation and could not be included in meeting the Airport minimum standard requirements for general fixed-base operations floor space.

Complainant admits that it could only fulfill the space requirement by counting the Hampton University subleased space. [FAA Exhibit 1, Item 5, page 6.] Since it could not effectively include that space while Hampton University occupied it, the Complainant did not meet the 1996 minimum space requirements for a general fixed-base operation.

Deficiency Related to 480 Square Foot Office Space

The Complainant argues on appeal, however, that the Director erred by failing to consider that the Respondent took a section of leased space away from the Complainant at the same time Respondent was asserting the Complainant failed to meet the minimum space requirements. [FAA Exhibit 1, Item 11, page 4.] The Complainant states in its appeal, "...[Respondent] refused to renew [Complainant's] lease of the space used for [Complainant's] flight school, then used a lack of sufficient square footage to claim that [Complainant failed to meet Minimum Standards]." [FAA Exhibit 1, Item 11, page 5.]

The space vacated by the Complainant at the Respondent's request was 480 square feet of office space used as a classroom and storage area for the Complainant's flight school. [FAA Exhibit 1, Item 1, page 4.] Complainant's floor space was deficient by 4,424 square feet. Even adding the vacated 480 square feet of office space to the Complainant's square feet of combined hangar space and shop and office space, Complainant would fail to meet the minimum standard floor space requirements for a general fixed-base operator under the 1996 Airport minimum standards.

Associate Administrator's Conclusion on Leased Space Deficiency

The Associate Administrator affirms the Director's conclusion that the subleased space occupied by Hampton University for its aircraft maintenance school could not be counted toward Complainant's fixed-base operation to meet the 1996 Airport minimum standards for a general fixed-base operator. Without the Hampton University subleased space, Complainant was deficient in complying with the 1996 Airport minimum standards for general fixed-base operator

⁴ Hampton University continues to operate its aircraft maintenance school at the Airport, but no longer has a sublease with the Complainant.

floor space. The 480 square foot office space neither caused, nor materially affected, the Complainant's total floor space deficiency.

The Associate Administrator finds the Director did not err in determining the Respondent was not currently in violation of grant assurance 22, *Economic Nondiscrimination*, by concluding Complainant's square footage of leased space was deficient, nor did the Director err in failing to assess the cause of this deficiency to be the Respondent's reclamation of 480 square feet of office space.⁵

2. Flight School

Complainant alleges on appeal that the Director erred in concluding Respondent's actions to recapture leased space from the Complainant's flight school in order to make it available for Mercury Air Centers' flight school was not a violation of grant assurance 22, *Economic Nondiscrimination*. [FAA Exhibit 1, Item 11, page 4.]

The record shows the Complainant had a month-to-month lease for a 480 square foot space to be used as a classroom and storage area for the Complainant's flight school. [FAA Exhibit 1, Item 4, exhibit 9, page 2.] Complainant states it operated its flight school under Federal Aviation Regulations (FAR) Part 61. [FAA Exhibit 1, Item 11, page 4.]

The 1996 Airport minimum standards requires all flight training programs to be approved by the FAA under Federal Aviation Regulations (FAR) Part 141. [FAA Exhibit 1, Item 3, exhibit 5, *1996 minimum standards*, page 7.] The 1994 minimum standards also called for flight training programs to be operated under FAR Part 141. [FAA Exhibit 1, Item 3, exhibit 4, *1994 minimum standards*, page 6.] The 1984 minimum standards did not specify the FAR Part for flight training. Rather, it stated, "Any flight training program shall be FAA approved." [FAA Exhibit 1, Item 3, exhibit 3, *1984 minimum standards*, item E.] (See Table 3 below.)

Only flight training programs operated under FAR Part 141 are considered "FAA-approved schools."

⁵ The Associate Administrator notes, however, that the Complainant does not argue – either in the Complaint or the appeal – that it has cured its fixed-base operator floor space deficiency by regaining control of the Hampton University hangar. The administrative record shows that the Complainant took action September 3, 2004, to terminate its month-to-month sublease with Hampton University in order to reclaim the 23,200 square feet of office and shop space on thirty (30) days' notice. [FAA Exhibit 1, Item 3, exhibit 36.] In addition, a telephone conversation with Hampton University Aerospace Center confirms Hampton University – while still operating its aircraft maintenance school on the Airport – is no longer operating under a sublease with the Complainant. [FAA Exhibit 1, Item 14.] Nonetheless, since neither the Complainant nor Respondent indicated this space was actually restructured to provide fixed-base operator services consistent with the 1996 Airport minimum standards, the FAA cannot determine that the floor space deficiency has since been cured.

Table 3: Flight School Requirements Stated in Airport Minimum Standards

Applicable Minimum Standards	Flight School Requirement	<i>Administrative Record Reference</i>
1996 Minimum Standards	FAR Part 141	[FAA Exhibit 1, Item 3, exhibit 5, page 7.]
1994 Minimum Standards	FAR Part 141	[FAA Exhibit 1, Item 3, exhibit 4, page 6.]
1984 Minimum Standards	FAA-approved flight training program.	[FAA Exhibit 1, Item 3, exhibit 3, #E.]

Complainant acknowledges it did not operate a flight school under FAR Part 141 as required by the minimum standards.⁶ However, Complainant argues it did operate a flight school under FAR Part 61, and such a departure from the minimum standards (between the FAR Part 141 and FAR Part 61) should be recognized as a de minimus departure from the minimum standards and not sufficient reason for the Respondent to recapture Complainant’s leased flight school space. [FAA Exhibit 1, Item 11, page 4.] In addition, Complainant argues it was not given a reasonable opportunity to cure the departure from the minimum standards before Respondent acted to terminate Complainant’s month-to-month lease on this property. [FAA Exhibit 1, Item 11, page 4.]

De Minimus Departure

There are two types of flight training schools, both of which must follow Federal Aviation Regulations (FAR):

- (1) Schools operated under FAR Part 141 are considered “FAA-approved schools,” and
- (2) Schools operated under FAR Part 61 are considered “non-approved schools.”⁷

The most common and least important distinction between them is the minimum flight time required for the private pilot certificate: 40 hours under Part 61, and 35 hours under Part 141. However, since the national average for earning a private pilot certificate is actually 60-75 hours (depending on the student’s ability and flying frequency), this difference isn’t important for initial pilot training. It does make a difference to commercial pilot applicants: Part 61 requires 250 hours, while Part 141 requires 190 hours.⁸

What differentiates the two is structure and accountability. Part 141 schools are periodically audited by the FAA and must have detailed, FAA-approved course outlines and meet student pilot performance rates. Part 61 schools don’t have the same paperwork and accountability requirements.⁹

⁶ Complainant states its Part 141 certificate was deemed inactive by the FAA for lack of students enrolled in the FAA Part 141 program. [FAA Exhibit 1, Item 11, page 4.]

⁷ See FAA web site at http://www.faa.gov/education_research/training/pilot_schools/index.cfm

⁸ See Aircraft Owners and Pilots Association (AOPA) web site at <http://flightraining.aopa.org/learntofly/school>.

⁹ See Aircraft Owners and Pilots Association (AOPA) web site at <http://flightraining.aopa.org/learntofly/school>.

Learning under Part 61 rules can often give students the flexibility to rearrange flying lesson content and sequence to meet their needs, which can be of benefit to part-time students. Many Part 141 schools also train students under Part 61 rules. Only Part 141 schools, however, can qualify for Veteran's Administration (VA) reimbursed training.¹⁰

Student pilots successfully completing flight training under either Part 61 or Part 141 receive the same certificate.

Since the final result is the same, the Associate Administrator is persuaded that the Complainant's departure from the minimum standards in offering flight training under Part 61 rather than under Part 141 could be considered a de minimus departure. FAA considers a requirement to offer flight training under FAR Part 141 instead of Part 61 to be an unreasonable minimum standard requirement. In this case, the Complainant did not challenge the reasonableness of this provision in the Airport minimum standards in its Complaint.¹¹ Indeed, the administrative record does not indicate that any aeronautical tenant at the Airport objected to such a standard.

While the FAA does not mandate minimum standards, the Respondent is encouraged to reconsider its Airport minimum standard regarding the specific requirement to offer flight school training only under FAR Part 141. The differences between the FAR Part 141 and Part 61 are de minimus as the final result of the training is the same: the issuance of the same license.

Opportunity to Cure Departure from Minimum Standards

Even though the FAA considers a requirement to offer flight training only under FAR Part 141 to be an unreasonable minimum standard requirement, FAR Part 141 was the standard at the time in question regardless of which set of minimum standards applies to the Complainant.

The administrative record in this case shows Complainant's Part 141 flight school was placed in inactive status December 31, 1993. [FAA Exhibit 1, Item 4, exhibit 10, page 2.] It remained in inactive status for more than 10 years. The administrative record shows the Complainant took action to reactivate its Part 141 certification only after the Respondent gave notice that it would not continue Complainant's month-to-month lease for the 480 square feet of office space used for Complainant's flight school.¹² [FAA Exhibit 1, Item 5, page 5.]

Based on this timeline, the Associate Administrator finds the Complainant had ample opportunity between December 31, 1993 (when Complainant's Part 141 certification was placed in inactive status) and September 2004 (when Complainant finally received its Part 141 certification) to come into compliance with the Airport minimum standards. The Complainant

¹⁰ See Aircraft Owners and Pilots Association (AOPA) web site at <http://flighttraining.aopa.org/learntofly/school>.

¹¹ Complainant questions whether the minimum standards require flight training to be conducted under Part 141, but does not challenge whether this requirement is reasonable. [FAA Exhibit 1, Item 11, page 4.]

¹² On May 18, 2004, Respondent gave notice to Complainant to vacate the 480 square feet of office space by June 30, 2004. [FAA Exhibit 1, Item 3, exhibit 37.] Complainant states it contacted FAA on August 10, 2004, and reactivated its Part 141 certification effective September 30, 2004. [FAA Exhibit 1, Item 5, page 5.]

simply chose not to take the appropriate action until it was threatened with loss of part of its leasehold.

Complainant objects to not having a sufficient opportunity to cure the defect between May 18, 2004 – when it was notified that the month-to-month lease on the 480 square feet of office space would be terminated – and June 30, 2004, the date given to vacate. [FAA Exhibit 1, Item 3, exhibit 37.] Admittedly, this was just six weeks’ notice on an issue that had been allowed to exist on the Airport for over ten years. However, the Complainant overlooks the fact that the lease itself was a month-to-month lease with no provisions regarding additional notice or cause of action. [FAA Exhibit 1, Item 4, exhibit 9.] The FAA will not step in to overturn a lease provision simply because the aeronautical tenant has discovered the provision the tenant agreed to has created an undesirable position for the tenant.

That said, the Associate Administrator is concerned that the Respondent elected to transfer office space from one aeronautical tenant to another for the purpose of offering the same type of service. At the time, however, it was expected that Mercury Air Centers would offer flight training under FAR Part 141 consistent with the 1996 Airport minimum standards while the Complainant was offering flight training under FAR Part 61 only. [See FAA Exhibit 1, Item 4, page 8.]

Associate Administrator’s Conclusion on Flight School

The Respondent invoked a lease provision that permitted it to cancel its month-to-month lease for 480 square feet of office space. That is not a violation of the grant assurances. The purpose of transferring the office space from one aeronautical tenant to another was to provide a level of service required under the minimum standards that was not being offered by the Complainant. That is not a violation of the grant assurances. The Airport minimum standards consistently required flight training to be conducted under an FAA-approved program, which is FAR Part 141. The FAA considers such a requirement to be an unreasonable requirement, yet the administrative record does not indicate that any of the aeronautical tenants on the Airport, including the Complainant, challenged the reasonableness of the requirement.

In its Complaint, Complainant argued that the 480 square feet of office space was critical to Complainant’s operation because Complainant could not become an FAA certified testing center without use of this space. [FAA Exhibit 1, Item 1, pages 4-5.] The administrative record shows, however, that the Complainant did obtain its FAR Part 141 certification effective September 30, 2004, after the Respondent had removed this space from Complainant’s leasehold. [FAA Exhibit 1, Item 5, page 5.]

The Complainant continues to operate its flight school, as does Mercury Air Centers through its subcontractor.¹³ As such, the harm to the Complainant’s flight school operation from the

¹³ On July 26, 2007, we contacted a representative from Complainant’s business at the phone number listed on the Airport’s web site (757) 874-5727 who confirmed Complainant is operating a flight school, but stated it was waiting for its Part 141 certificate from the FAA. On the same date, we contacted a representative from Mercury Air Centers through the phone number listed on the Airport’s web site (757) 886-5755. We were directed to Mercury’s subcontractor at (757) 240-3272. On July 28, 2007, we contacted the subcontractor; we were advised

Respondent having invoked the provision to terminate the month-to-month lease for 480 square feet of office space appears to be immaterial.¹⁴ The size of the space, itself, is very small when compared to the Complainant's total leased floor space.¹⁵

The Associate Administrator finds the Director might have elected to find the Respondent in noncompliance with grant assurance 22, *Economic Nondiscrimination*, as a result of recapturing leased space from the Complainant's flight school in order to make it available for Mercury Air Centers' flight school, but used his discretion in determining it did not rise to the level of a grant assurance violation given that the Respondent's actions were consistent with the language in the lease and consistent with the minimum standards in effect at the time and accepted by the Airport tenants. This is not an error. The Associate Administrator finds the Director did not err in using his discretion to conclude the Respondent's actions to recapture leased space from the Complainant's flight school in order to make it available for Mercury Air Centers' flight school was not a violation of grant assurance 22, *Economic Nondiscrimination*, under the circumstances in this case.

Associate Administrator's Conclusion on the Application of Airport Minimum Standards

The appeal does not identify any area where the Director erred in finding the Respondent did implement a program to enforce its Airport minimum standards and did take effective action to require Mercury Air Centers to comply with the applicable minimum standards.

Upon review, the Associate Administrator concurs with the Director that the Hampton University subleased space was not being used as part of the Complainant's fixed-base operation and, as a result, the Complainant's fixed-base operation leased floor space was insufficient to meet the 1996 Airport minimum standards. The Associate Administrator is not persuaded by the Complainant's argument that the loss of 480 square feet of floor space was the cause of the Complainant's leased floor space deficiency of more than 4,400 square feet. Neither is the Associate Administrator persuaded that the loss of this 480 square foot space materially altered the Complainant's ability to offer flight school training or that the Respondent's actions with regard to this space resulted in a grant assurance violation under the particular circumstances of this case.

The Associate Administrator finds the Director did not err in concluding the Respondent is not currently in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, by applying its Airport minimum standards in an allegedly inequitable manner.

the subcontractor offers flight training under FAR Part 61 only.

¹⁴ In *Jimsair Aviation Services, Inc. v San Diego County Regional Airport Authority*, FAA Docket No. 16-06-08 (April 12, 2007) (Director's Determination), the FAA found no violation where the Complainant's business operation was not impacted negatively by the airport sponsor's reluctance to renew Complainant's fuel permit. In that case, the Complainant was permitted to continue its fueling operation without the permit and without threat of being found in default on its lease.

¹⁵ The 480 square feet of office space represents only 1.2% of Complainant's total leased floor space of 40,276 square feet; and only 2.8% of Complainant's 17,076 square feet of leased floor space dedicated to fixed-base operator activities.

B. Termination and Eviction

Complainant alleges on appeal that the Director erred in concluding that Respondent's actions to terminate Complainant's lease and evict Complainant did not result in an unreasonable denial of access in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. [FAA Exhibit 1, Item 11, pages 3 and 5.]

The Complainant states in its appeal, "If [Complainant] meets the requirements of its lease and the applicable Minimum Standards, it should be permitted to quietly enjoy the premises and provide aeronautical services without interference by the [Respondent]." [FAA Exhibit 1, Item 11, page 5.]

Respondent does not disagree with that statement, but rather, argues Complainant did not meet the requirements of its lease. [FAA Exhibit 1, Item 12, page 2.]

The Complainant argues the eviction proceeding was initiated in order to grant an exclusive right to Mercury Air Centers. [FAA Exhibit 1, Item 11, page 1.]

The Respondent argues court action is necessary to enforce the terms of its lease. Regarding the possibility of eviction, Respondent argues that it is illogical to assert that an airport sponsor cannot remove a tenant from the Airport "no matter how many times [Complainant] violates its lease." [FAA Exhibit 1, Item 12, page 2.]

There are two points to consider under this issue: (1) whether the Complainant is complying with the terms of its lease; and (2) whether the Respondent has unreasonably denied Complainant access to the Airport.

Lease Terms

The administrative record confirms Respondent and Complainant disagree on the interpretation of various lease terms, including the type of revenue that must be reported and/or excluded [FAA Exhibit 1, Item 1, page 6] and which set of Airport minimum standards is applicable to the Complainant [FAA Exhibit 1, Item 7, page 3].

As reported in the Director's Determination, the Respondent states it conducted a random facility audit of the Complainant's fixed-base operation in February 2004, at which time several deficiencies were uncovered and communicated to the Complainant. Respondent subsequently conducted a fuel sales audit and a full financial audit of all gross revenues, uncovering unreported receipts. The Respondent requested additional financial information, which Complainant was either unable or unwilling to provide.¹⁶ This has resulted in a significant

¹⁶ Respondent states, "[Complainant] refused to provide adequate financial records to permit a complete financial audit of prior years." [FAA Exhibit 1, Item 4, page 7.] The Complainant states Respondent made "onerous requests for financial records" [FAA Exhibit 1, Item 2, #8] and argues Respondent refused "to grant a time period longer than twelve days in order to allow [Complainant] to locate and gather records..." [FAA Exhibit 1, Item 5, page 4.]

dispute over the payment of rent. [See FAA Exhibit 1, Item 10, *Director's Determination*, pages 37-38.]

The Respondent argues the Complainant has materially breached its lease, and court action is necessary to enforce the terms of the lease. [See FAA Exhibit 1, Item 12, page 2.]

The FAA does not ordinarily arbitrate or mediate negotiations through a formal Part 16 complaint process. Nor does the FAA enforce lease terms between parties to an agreement. Rather, the FAA enforces contracts between an airport sponsor and the federal government. [See AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination).] The FAA is not a party to the litigation proceedings between the Complainant and Respondent; neither does the FAA have jurisdiction over the matters of contract law to be decided in this court proceeding.

The administrative record shows the court proceeding involving the Complainant and Respondent is scheduled for October 10-12, 2007, in a Virginia state court. [FAA Exhibit 1, Item 11, page 3.] That is the proper venue for resolution of this matter. Whether or not the Complainant has breached the terms of its lease will be decided by the court at that time.

Airport Access

Complainant argues on appeal the Respondent "has taken action to preclude [Complainant] from operating as an aeronautical user at the airport." [FAA Exhibit 1, Item 11, page 3.] Nonetheless, at the present time, Complainant continues to operate on the Airport as a full service fixed-base operator.¹⁷

The Director stated in his determination:

"The FAA cannot determine that [Respondent's] alleged 'attempt to terminate' [Complainant's] 1984 lease is an unreasonable denial of access because it is speculative and properly the subject of court review regarding the meaning and applicability of lease terms and the legitimacy of certain documents." [FAA Exhibit 1, Item 10, *Director's Determination*, page 39.]

In the present Part 16 case, the Respondent has not effectively denied the Complainant access to the Airport. Even though the Respondent may have taken action to terminate Complainant's lease and evict Complainant, the Complainant is currently operating as a full-service fixed-base operator on the Airport. The underlying contract dispute between the Complainant and Respondent regarding Complainant's compliance with its lease terms is scheduled to be resolved in state court.

¹⁷ The Airport's web site lists both Complainant and Mercury Air Centers as full-service fixed-base operators. The web site includes the business names, the addresses, phone numbers, fuel type, services, and hours of operation for both businesses. [See http://www.nnwairport.com/PHF_GA.htm.]

The FAA cannot find that the Respondent has unreasonably denied Airport access to the Complainant when the Complainant is, in fact, operating on the Airport as a full-service fixed-base operator. In addition, as the Director stated, “Threatening to deny rights under an agreement that describes terms of tenancy or minimum standards is not an unreasonable denial of access in a situation of default by the airport user. Not adhering to minimum standards or not paying rent are reasonable bases for a finding of default.” [FAA Exhibit 1, Item 10, Director’s Determination, page 38.] As noted by the Respondent, a material breach may be a valid basis for removing an airport tenant without violating the grant assurances. [See FAA Exhibit 1, Item 12, page 2.] The courts will decide whether there has been a material breach.

Associate Administrator’s Conclusion on Respondent’s Actions to Terminate and Evict

In arguing its case, Complainant proposes that when an airport sponsor denies access to an aeronautical user to operate on a federally obligated airport, such denial ipso facto results in a grant assurance violation. [FAA Exhibit 1, Item 11, page 3.]

That is an incorrect assumption. An airport sponsor’s federal obligations do not require it to enter into or sustain agreements with every prospective aeronautical service provider. For example:

- In Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker v. County of San Diego, California, FAA Docket No. 16-04-08 (July 25, 2005) (Director’s Determination), the FAA found the record supported that the Complainants in that case were not qualified parties seeking to develop airport property. The Director found no grant assurance violation where the Complainant was not a qualified party to conduct the activity in question.

In addition, an airport sponsor can restrict aeronautical access on a reasonable basis. For example:

- In SeaSands Air Transport, Inc. v. Huntsville-Madison County Airport Authority, FAA Docket No. 16-05-17 (August 28, 2006) (Director’s Determination), the FAA found the failure to pay rent or to provide proof-of-insurance to be a reasonable basis to terminate an agreement. In this case, the FAA found that the sponsor’s federal obligations “do not require it to continue a business relationship with any corporation that fails to exercise management controls or sufficient corporate governance to prevent and correct highly unprofessional behavior by its principals or employees.” [See Director’s Determination, 16-05-17, pages 21, 23.]

The Respondent argues that Complainant has materially breached its lease agreement. [FAA Exhibit 1, Item 12, page 2.] This dispute will be resolved in state court, which is the proper venue for such a dispute. [FAA Exhibit 1, Item 11, page 3.] As noted by the Respondent, a material breach may be a valid basis for Complainant’s removal from the Airport and does not automatically constitute economic discrimination. [See FAA Exhibit 1, Item 12, page 2.]

The Associate Administrator finds the Director did not err in concluding that Respondent's actions regarding Complainant's compliance with its lease did not result in an unreasonable denial of access in violation of grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, given that the Respondent's legal action is based on allegations of contract breach to be resolved in state court, and, as of the date of this decision, the Complainant remains on the Airport as a full-service fixed-base operator.

C. Staying the FAA's Final Decision and Order

The Complainant asks the FAA to stay its Final Decision and Order in this Part 16 proceeding for several months until the underlying lease dispute between Complainant and Respondent is resolved in state court. [FAA Exhibit 1, Item 11, pages 5-6.]

This appeal considers only narrow issues involving allegations of error in the Director's Determination. The court action involves matters of contract law over which the FAA has no jurisdiction.

The Part 16 complaint and appeal process is intended to be an expedited process. The Associate Administrator is expected to issue a final decision and order within 60 days after the due date of the reply following an appeal of the Director's Determination. [14 CFR § 16.33(d).] While there are understandably occasions when an extension of time is necessary to accommodate special issues arising for complainants, respondents, and within the FAA, those extensions must be justified based on the circumstances surrounding the particular case. In this case, the Complainant requests an extension for the purpose of awaiting the outcome of a state court action. That state court action involves a contract dispute between the Complainant and Respondent. The FAA is not a party to the state court action, nor is the FAA's conclusion dependent on the outcome of that court action. The state court litigation does not provide a basis for staying the Part 16 process in this case.

VII. CONCLUSION

This case involves state court actions regarding issues of contract law. The FAA's role in this appeal is to determine only the narrow issues of whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination of May 8, 2007.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR § 16.227.]

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, and the appeal and reply submitted by the parties, in light of applicable law and policy. Based on this reexamination, 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 appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. This Final Decision and Order does contain an encouragement to the Respondent to broaden its minimum standards with regard to flight schools, in order to avoid the potential for future complaints.

The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

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 Decision and Order has been served on the party. [14 CFR, Part 16, § 16.247(a).]



November 6, 2007

D. Kirk Shaffer
Associate Administrator
for Airports

Date