

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

LARRY L. DAVIS)	
Complainant,)	
)	
v.)	Docket No. 16-10-01
)	
JACKSON MUNICIPAL AIRPORT)	
AUTHORITY,)	
Respondent.)	
_____)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal Complaint filed in accordance with FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings (FAA Rules of Practice), 14 Code of Federal Regulations (CFR) Part 16.

Mr. Larry L. Davis, (Complainant) has filed a Complaint pursuant to 14 CFR Part 16 against the Jackson Municipal Airport Authority (JMAA or Respondent) alleging Respondent is in violation of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*, and 49 CFR Part 23, *Participation of Disadvantaged Business Enterprise in Airport Concessions*.¹ The Complainant filed its Complaint with the FAA on February 26, 2010, and it was docketed by the FAA on March 18, 2010.

The Complainant has been employed by JMAA since February 2004 and served as the JMAA Disadvantaged Business Enterprise Liaison Officer (DBELO) and Airport Concession Disadvantaged Business Enterprise Liaison Officer (ACDBELO) from June 16, 2006 until November 1, 2008. As the JMAA DBELO and ACDBELO, Mr. Davis' duties included implementing all aspects of JMAA's Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) programs. The Complainant is currently a Compliance Analyst for JMAA. The Complainant is presently responsible for collecting data, preparing reports, and monitoring compliance with the provisions of the DBE (49 CFR Part 26) and ACDBE (49 CFR Part 23) programs.

¹ FAA Exhibit 1, Item 1.

The Complainant alleges Respondent failed to adhere to rules, regulations, and grant conditions, (written and implied) of signed financial agreements with the United States Department of Transportation (DOT) and the Federal Aviation Administration under the Airport Improvement Program (AIP).² The Complainant claims the administrative body of JMAA repeatedly ignored all verbal and written input from him while serving in the role of DBELO.³

In addition, the Complainant claims the Respondent's DBE program is not narrowly tailored as it relates to goal setting on federal and state assisted projects and contracts.⁴

Specifically, the Complainant claims the Respondent arbitrarily establishes goals on every federal, state, and local project irrespective to annual goal accomplishment data. Moreover, the Complainant alleges that from October 1, 2008, through February 25, 2010, goals established on projects lack any substantial relationship to defined discriminatory remediation objectives.⁵ The Complainant claims the Respondent set race conscious goals on every project without regard to a coherent policy or any definitive goal setting methodology.⁶ The Complainant asserts that all project goals established on federally funded projects and contracted out from October 1, 2008, until February 25, 2010, including construction and professional service contracts, lack the due diligence and requisite findings to meet narrow tailoring requirements for goal setting, goal compliance, and definitive DBE program administration.⁷

The Complainant also alleges the Respondent has violated 49 CFR § 26.109(d) by retaliating against him by denying him access to information and vital resources needed to complete his assigned duties effectively as Compliance Analyst as a direct result of his public assertions.⁸ In addition, the Complainant alleges he has experienced retaliatory and adverse employment actions because of his public assertions made to JMAA's administrative body and the JMAA Board of Commissioners. These adverse employment actions include "vague, unsubstantiated, unachievable, imbalanced, and wrongful employee performance evaluations."⁹ Moreover, the Complainant claims he has experienced isolation, and disparate treatment in retaliation for bringing these issues to the attention of the administrative body and Board of Commissioners of the JMAA.¹⁰

Respondent denies it has failed to adhere to the rules, regulations, and grant conditions, (written and implied) of signed financial agreements with the United States Department of Transportation, and the Federal Aviation Administration, under the Airport

² Id.

³ Id. The Complainant did not include any exhibits in his Complaint document; however, he included several numbered and unnumbered "points." Point #1 asserts the Respondent ignored input from the Complainant.

⁴ Id. Point #3

⁵ Id. Point #5

⁶ Id. Point #4

⁷ Id. Point #5

⁸ Id. Page 5, Paragraph 4.

⁹ Id.

¹⁰ Id. Page 5, Paragraph 5.

Improvement Program. The Respondent states in its Answer that the Complainant has failed to prove any such violations of 49 CFR Parts 23 and 26 by a preponderance of reliable, probative, and substantial evidence.¹¹ The Respondent counters that the Complainant lacks standing in his claim that the Respondent arbitrarily established race-conscious goals under Parts 23 and 26.¹² In addition, the Respondent argues that the Complainant's claim of retaliation via poor performance evaluations is not supported by the record. The Respondent counters that the Complainant's negative performance evaluations are an accurate and honest assessment of the Complainant's job performance. The Respondent adds that the evaluations serve as evidence of JMAA's determination to upgrade its technical compliance in certification and contracting under Parts 23 and 26 - areas for which the Complainant has been primarily responsible.¹³ The Respondent recommends the Director dismiss the Complaint with prejudice.¹⁴

II. THE AIRPORT

Jackson-Evers International Airport is a public-use, small-hub city owned commercial-service airport in Jackson, Mississippi. The Jackson Municipal Airport Authority (JMAA) owns and operates Jackson-Evers International Airport, and one other airport, (Hawkins Field) and is the airport sponsor for the purposes of compliance with federal statutes, regulations, and grant assurances. In each of the fiscal years from 2006 through the present, JMAA received federal financial assistance under FAA's Airport Improvement Program (AIP) to finance in whole or in part the planning and development of Jackson-Evers International Airport. The AIP program is a grant program authorized by the Airport and Airway Improvement Act, 49 U.S.C. § 47101, *et seq.* As a recipient of federal AIP funds, the Respondent is subject to all grant assurances, including the assurance to comply with the requirements of Title 49 CFR Parts 26 and 23, the DBE and ACDBE regulations of the U.S. Department of Transportation.

III. BACKGROUND AND PROCEDURAL HISTORY

A. BACKGROUND

From February 2004 to present, the Complainant has been employed with the JMAA as a Compliance Analyst. The Complainant is responsible for collecting data, preparing reports and monitoring compliance to the provisions of the JMAA DBE Program.¹⁵

In February 2006, the Respondent authorized the JMAA staff to begin working on a budget for a New Disparity Study.¹⁶ On June 16, 2006, the JMAA Director of Legal Compliance, resigned. The Respondent states in its Answer the JMAA Chief Executive Officer (CEO) decided to not to fill the position and instead reassigned certain duties of

¹¹ FAA Exhibit 1, Item 6, page 41.

¹² *Id.*

¹³ FAA Exhibit 1, Item 6, exhibit 12.

¹⁴ FAA Exhibit 1, Item 6, page 42.

¹⁵ FAA Exhibit 1, Item 1. In the body of his Complaint, the Complainant describes his job responsibilities. [See page 2, paragraph 1.]

¹⁶ FAA Exhibit 1, Item 10, exhibit 1.

that position. [FAA Exhibit 1, Item 6, page 4.] The JMAA CEO created a new senior level position devoted exclusively to managing the JMAA DBE Program.¹⁷ From June 2006 until November 2008, the Complainant served as the JMAA DBELO and ACDBELO and was supervised by Ms. Bonnie Wilson, Chief Operating Officer (COO) of JMAA. The Complainant was responsible for implementing all aspects of the JMAA DBE and ACDBE Programs.¹⁸ In 2007, the Complainant requested additional software and technical support in order to perform his duties in regard to the DBE Program. Ms. Wilson determined the software enhancements proposed by the Complainant were impractical and impossible to implement. The Respondent stated that Ms. Wilson said the Complainant could acquire the necessary data from existing JMAA financial and project management programs. Moreover, Ms. Wilson recommended the Complainant become more assertive in seeking information and assistance from other staff members.¹⁹ On August 2, 2007, Ms. Wilson sent a memorandum to the JMAA Director of Human Resources and Administration commenting on the impracticality of the Complainant's proposals. She reiterated her belief that more could be accomplished if the Complainant were more focused and assertive in performing his own basic duties.²⁰

On April 28, 2008, Mr. Dirk Vanderleest, JMAA CEO, presented the JMAA Board with a Strategic Plan that included creating the new position of DBE Director that would be responsible for upgrading and managing the JMAA DBE Program. The Strategic Plan also included issuing a Request for Qualifications (RFQ) for a consultant to prepare the New Disparity Study.²¹ Sixteen applicants applied for the DBE Director position. The Respondent states in its Answer that the Complainant applied for the DBE Director position. The Complainant's application was reviewed and he was interviewed but was not selected.²² On August 28, 2008, the position of DBE Director was offered to Mr. Jack Thomas of St. Louis, Missouri. Mr. Thomas accepted the position on September 3, 2008.²³ One of the major tasks assigned to the new DBE Director entailed leading a team to draft the RFQ for the New Disparity Study.²⁴ The RFQ was published on January 23, 2009. Responses to the RFQ were received March 27, 2009.

On September 29, 2008, the Complainant submitted the first of a series of complaints directly to the JMAA Board alleging violations of Sections 26.13, 26.23, 26.25, and 26.47 of 49 CFR Part 26. The Complainant charged JMAA CEO, Mr. Vanderleest, and Complainant's supervisor and COO, Ms. Wilson, with "malfeasance, malmanagement [sic], lack of due diligence or gross neglect of duty."²⁵ The Complainant also alleged that

¹⁷ FAA Exhibit 1, Item 6, exhibit 4.

¹⁸ FAA Exhibit 1, Item 1.

¹⁹ FAA Exhibit 1, Item 6, exhibit 3.

²⁰ Id.

²¹ FAA Exhibit 1, Item 6, exhibit 4.

²² The Complainant confirms he applied for the position of DBE Director and was not chosen. [FAA Exhibit 1, Item 10, exhibit 11.]

²³ FAA Exhibit 1, Item 6, exhibit 5 provides a description of the duties and responsibilities of the DBE Director.

²⁴ Minutes of an April 28, 2008, JMAA Board Administration Committee Meeting with attached DBE Strategic Plan states that a RFQ for a Disparity Study was issued. [FAA Exhibit 1, Item 6, exhibit 4.]

²⁵ FAA Exhibit 1, Item 6, exhibit 6.

beginning on June 16, 2006, the date the Director of Legal Compliance resigned, Complainant had performed the duties of that position in regard to the JMAA DBE Program. Therefore, the Complainant stated he believed he was entitled to extra compensation because those duties exceeded his job description as Compliance Analyst.

On November 1, 2008, Mr. Thomas began his employment with the JMAA as the DBE Director and also became the ACDBELO/DBELO.²⁶ The Respondent asserts that at a November 20, 2008, JMAA Board meeting, the Complainant referenced the September 29, 2008, Complaint. The Board did not take any action in reference to the Complaint at this meeting.²⁷ However, on December 17, 2008, the JMAA Board adopted a resolution stating "the Board finds and determines that no material violations of 49 CFR Part 26 have been committed by JMAA, and no material violations of 31 U.S.C Section 3729 et seq., commonly known as the federal False Claims Act, have been committed by JMAA, Vanderleest or Wilson, as alleged in the Complaint."²⁸ However, in response to the Complainant's September 29, 2008, Complaint, the JMAA Board adopted a "second" resolution to review and compare the Complainant's job description to his actual duties and responsibilities after the Director of Legal Compliance resigned. The second resolution also directed the Complainant be advised that the Board found no material violations of Part 26. In addition, the second resolution instructed the DBE Director to review the JMAA DBE Program, including issues and concerns brought forth by the Complainant, and to make recommendations for improvement to the Board. The Board also instructed the JMAA Human Resources (HR) Director to compare the Complainant's salary to the salaries of employees of airports with similar duties and responsibilities and to make any recommendations.²⁹ A letter dated January 14, 2009, from the JMAA Board was forwarded to the Complainant advising him of the resolutions, as well as informing him that he would be under no special scrutiny because of his Complaint and that he would not be retaliated against. A reminder was sent to Mr. Vanderleest and Ms. Wilson not to retaliate against Complainant.³⁰

The Respondent states that in May 2009, after approximately six months as JMAA DBE Director, Mr. Thomas received a Certificate of Appreciation at the National Association for the Advancement of Colored People (NAACP) Freedom Fund Scholarship and Awards Banquet in Jackson, Mississippi, for his work as JMAA DBE Director.³¹ In June 2009, Mr. Thomas evaluated the job performance of the Complainant for the first time. His initial evaluation stated that the Complainant needed improvement in ten of eleven Competency/Performance Standards that were necessary for the position of Compliance Analyst.³² These standards were directly related to DBE program compliance responsibilities. Furthermore, Mr. Thomas noted the suggestions for improvement made by the Complainant and the Complainant's failure to perform his own compliance duties

²⁶ FAA Exhibit 1, Item 6, page 6.

²⁷ There are no minutes pertaining to a November 20, 2008, JMAA Board Meeting in the record of documents.

²⁸ FAA Exhibit 1, Item 6 at 7.

²⁹ FAA Exhibit 1, Item 6, exhibit 8.

³⁰ Id.

³¹ The Respondent has not provided a copy of the certificate of appreciation for the record.

³² FAA Exhibit 1, Item 6, exhibit 10.

mirrored the observations made by Ms. Wilson in 2007.³³ The Complainant responded to the June 2009 evaluation by disagreeing with the findings of Mr. Thomas. Moreover, the Complainant stated that he assumed Mr. Thomas was hired to address the very issues the Complainant had previously brought to the attention of the Board.³⁴ In June 2009, Mr. Thomas was named Robinson Watson Book Company Minority Business Enterprise (MBE) Advocate of the Year.³⁵ On September 23, 2009, Mr. Thomas evaluated the Complainant's performance in an annual performance evaluation and observed no measurable improvement in job performance since the June 2009 performance evaluation of the Complainant.

On September 24, 2009, Mr. Thomas presented the "DBE Program Review" to the JMAA Board. Mr. Thomas noted problems and made recommendations for improvement in the areas of Certification, Contracting, ACDBE Program, and JMAA Outreach.³⁶ The Respondent stated that Mr. Thomas did not have confidence in the Complainant's ability to carry out the duties of the JMAA DBE Program.³⁷ Mr. Thomas recommended hiring an outside consultant to support the JMAA staff in the following areas: reviewing and, if necessary, changing the certification status of all businesses that were already certified by the Respondent; provide certification training; and assisting in the development and implementation of a certification process. The Board unanimously concurred with the findings of the DBE Program Review and directed Mr. Thomas and JMAA staff to implement those findings.³⁸ The Board did not act on the recommendation to hire an outside consultant, but did agree to continue that discussion at a subsequent Board meeting. The Complainant alleges in his Reply that he was totally unaware of the DBE Program Review and did not review it until his Complaint was in progress.³⁹

Also on September 24, 2009, Ms Woodward, JMAA Human Resources Administration Director, presented the Board with an Assessment of Duties and Responsibilities/Comparative Analysis of Salary and Benefits of the Complainant that was requested by the Board in January 2009.⁴⁰ This analysis concluded the Complainant's compensation was comparable to others with the same job classification and that his compensation should remain unchanged.⁴¹ The analysis also determined additional compensation for work performed beyond his job classification was not justified.

³³ August 7, 2007, Memorandum from Bonnie Wilson, JMAA COO, to Dirk Vanderleest, JMAA CEO and Rene Woodward, Director of Human Resources and Administration, addressing policy and current practices concerns of Complainant.

³⁴ FAA Exhibit 1, Item 6, exhibit 11, "Additional Comments."

³⁵ The Respondent has not provided a copy of the award for the record.

³⁶ FAA Exhibit 1, Item 6, exhibit 13.

³⁷ The Respondent makes this assertion in his Rebuttal, page 27.

³⁸ FAA Exhibit 1, Item 6, exhibit 14.

³⁹ In Complainant's Reply, he states he did not review and was even aware of the existence of the DBE Review until the processing of his Part 16 Complaint.

⁴⁰ FAA Exhibit 1, Item 6, exhibit 15.

⁴¹ Id.

On October 2, 2009, the JMAA DBE Program was recognized by the Mississippi Minority Business Alliance for its outstanding contributions to minority business development in the state of Mississippi.⁴²

On October 22, 2009, JMAA CEO Mr. Vanderleest submitted a memorandum to the Complainant summarizing the findings of the September 24, 2009, "Assessment of Duties and Responsibilities/Comparative Analysis."⁴³ The Complainant replied to the memorandum on the same day. The Complainant did not agree with the findings and repeated his assertions made in his initial Complaint. The Complainant stated that his prior evaluations of June and September 2009 to be void of measurable, obtainable, supportive documentation, and constructiveness.⁴⁴

On or about November 6, 2009, the Complainant filed a Complaint with the Federal Aviation Administration (FAA).⁴⁵ The Respondent claims it never received a formal notice of the filing or a copy of the Complaint from the Complainant or the FAA. The Respondent states that on November 17 and 18, 2009, in telephone calls between the Respondent's legal counsel and the FAA Civil Rights Division, the legal counsel pledged to fully cooperate with any investigation of the JMAA DBE Program. The JMAA Board met on November 19, 2009, to discuss the FAA Civil Rights Complaint; that meeting resulted in the directive to the JMAA legal counsel and staff to cooperate fully with the FAA investigation.⁴⁶ The JMAA Board also reaffirmed their previous direction to staff to treat the Complainant as any other employee and not to participate in any retaliatory actions against him as a result of his Complaint. In addition, the JMAA Board also directed its legal counsel to assure the Complainant his complaints have been, and will continue to be, taken seriously by the JMAA Board.⁴⁷

On November 20, 2009, the JMAA Board forwarded a letter signed by the Board Chairman to the Complainant acknowledging the Complaint filed with the FAA Office of Civil Rights and assuring Complainant the Respondent intended to cooperate fully with any investigation.⁴⁸ The Complainant was also assured that the staff of JMAA had been instructed not to retaliate against him because of his Complaint.

The Respondent alleges in its Answer that on March 16, 2010, the Complainant forwarded a multi-page email memorandum to the JMAA Board in response to the recommendation by Mr. Thomas to hire an outside consultant.⁴⁹ The Complainant alleged JMAA would breach its "fiduciary and governance obligations" if it hired an outside consultant. On April 21, 2010, the Complainant forwarded another memorandum to the Board claiming he could explain the JMAA DBE Program's shortcomings in ten minutes. The Complainant also stated that if the Board agreed with his

⁴² The Respondent has not provided a copy of the recognition for the record.

⁴³ FAA Exhibit 1, Item 6, exhibit 19.

⁴⁴ FAA Exhibit 1, Item 10, exhibit 17.

⁴⁵ FAA Exhibit 1, Item 6, exhibit 21. An exact date of the filing is not a part of the record.

⁴⁶ FAA Exhibit 1, Item 6, exhibit 21.

⁴⁷ Id.

⁴⁸ FAA Exhibit 1, Item 6, exhibit 22.

⁴⁹ The Respondent has not provided a copy of the March 16, 2010, memorandum for the record.

recommendations, he would withdraw his Complaint.⁵⁰ The Respondent did not respond to these memorandums.

On April 26, 2010, the JMAA Board approved the scope of services for a New Disparity Study at an estimated cost of \$631,737.⁵¹ The Disparity Study would include methodologies and data sources that would be applied to the JMAA DBE Program. The Study would also include private sector disparity analysis, a review of race and gender neutral approaches to promoting DBE participation, a master contract and subcontract database, a master DBE directory, DBE availability estimates, a JMAA procurement review, and legal standards and design standards for JMAA DBE programs.

On May 20, 2010, the Complainant filed a Freedom of Information Act (FOIA) request with the Respondent asking for a copy of the methodology and goal setting worksheets used to establish JMAA DBE goals on all projects advertised to the general public involving federal funds from November 2008 thru May 2010.⁵² As a part of this request, the Complainant asked for the sources used to support the numbers; the market area applied to each goal; and information provided separately for each goal advertised.⁵³ The Complainant alleges the Respondent has completely ignored his recommendations for policy adjustment and changes, which has resulted in race conscious goals being set on all projects. The Complainant adds that race conscious goals were set on every project contracted out without regard to a coherent policy or definitive goal setting methodology.⁵⁴ The Respondent hand delivered 615 pages of public record documents to the Complainant on June 9, 2010.⁵⁵ The Complainant states the only goal setting worksheets he received were the goals he, himself, had prepared for fiscal years 2008 through 2010.

The Respondent has submitted DBE annual reports to the FAA as required by 49 CFR § 26.45 (f)(1), describing the data and corresponding methodologies used to attain the overall goal under Part 26 for the applicable fiscal years (FY) 2006-2010 covered by this Complaint.⁵⁶ The Complainant served as JMAA DBELO from June 16, 2006, until November 1, 2008, and was responsible for calculating the Annual Goals. The Respondent states the Complainant prepared the DBE Annual Reports for FY2007 and FY2008.⁵⁷ The Respondent claims in its Answer that the Complainant was late in preparing the FY2009 DBE Annual Goal Report and that Ms. Wilson and Mr. Thomas (who was not yet officially on board) worked together preparing the FY2009 DBE

⁵⁰ FAA Exhibit 1, Item 6, exhibit 24, page 3.

⁵¹ In its Answer, the Respondent provides an estimated cost of the Disparity Study.

⁵² FAA Exhibit 1, Item 10, exhibit 30A.

⁵³ Id.

⁵⁴ The Complainant alleges this in his original Complaint (page 3) no. 4

⁵⁵ FAA Exhibit 1, Item 10, exhibit 30.

⁵⁶ FAA Exhibit 1, Item 6, exhibit 25. The FAA received Respondent's DBE Annual Goal reports for FY 2006 through FY 2010. In its Answer, the Respondent states it has received no communication from FAA indicating any violation of Part 26 in the DBE Annual Goals for FY2006-FY2010.

⁵⁷ The Complainant does not deny this claim by the Respondent and states in his Reply that he was involved in setting goals prior to the arrival of DBE Director Mr. Thomas.

Annual Report.⁵⁸ The Complainant alleges in his Reply that it was Ms. Wilson who asked him to “hold off” on completing the 2009 Annual Goal.⁵⁹ The Respondent states in its Answer that the Complainant calculated and prepared the FY2010 DBE Annual Report.⁶⁰

The Respondent acknowledges the challenges in setting DBE annual goals and matching actual DBE participation. The Respondent states in its Answer that it intentionally set its DBE annual goals late in its fiscal year to capture as complete as possible project progress and payments for that year. The Respondent asserts that it typically has a small number of projects that are subject to Part 26. Additionally, the Respondent asserts in its Answer that fluctuations in DBE participation in a single project can cause DBE results to be below or above the annual goal amount and not allow for proper adjustments if payments are multi-year payments.⁶¹

The Respondent asserts in its Answer that it has not received any complaints from any non-DBE entities from June 2006 to the present claiming discrimination, nor has it received any communication from the FAA in reference to violation of Part 26 in the DBE Annual Reports submitted for fiscal years 2006-2010.⁶² The JMAA submits tri-annual goal setting methodology reports on concessions with the FAA that include data and methodologies used to obtain overall concession goals. The Complainant prepared and filed the JMAA Tri-Annual Concession Goal Reports for fiscal years 2007-2009 and 2010-2012.⁶³ Under the period covered by this Complaint, the Respondent has not initiated concession projects subject to Part 23. The Respondent has not received any communication from the FAA to indicate any violation of Part 23 in the Tri-Annual Concession Goal Reports for fiscal years 2007-2009 and 2010-2012.⁶⁴

As of the date of this Complaint, the Complainant is still employed by JMAA in the same position as Compliance Analyst and has received increased pay.⁶⁵

B. PROCEDURAL HISTORY

On February 26, 2010, the Complainant filed its Part 16 Complaint with no exhibits. [FAA Exhibit 1, Item 1.]

⁵⁸ In its Answer, the Respondent alleges that the Complainant was late in preparing the FY 2009 Goals.

⁵⁹ The Complainant asserts in his Reply, (page 32) that supervisor Ms. Wilson directed him to “hold off” in preparing the FY 2009 Goals.

⁶⁰ FAA Exhibit 1, Item 10, exhibit 29; emails between Complainant Larry L. Davis and DBE Director Jack Thomas.

⁶¹ Although Respondent’s methodology is not challenged by the Complainant, the methodology was accepted by the FAA in FY 2006, FY 2007 and FY 2008. (FAA Exhibit 1, Item 15, Exhibit 1).

⁶² There are no copies of complaints of discrimination for the record.

⁶³ FAA Exhibit 1, Item 6, exhibit 30.

⁶⁴ In reference to communication from FAA concerning Annual DBE Report, copies FY 2006, FY 2007 and FY 2008 FAA review/approval letters can be found in FAA Exhibit 1, Item 15, exhibit 1.

⁶⁵ FAA Exhibit 1, Item 13.

On March 18, 2010, the FAA issued its Notice of Docketing. [FAA Exhibit 1, Item 2.]

On April 12, 2010, Respondent filed a Motion for Extension of Time to Answer. [FAA Exhibit 1, Item 3.]

On April 14, 2010, Complainant Larry L. Davis filed a Motion to Deny Extension of Time to File Answer. [FAA Exhibit 1, Item 4.]

On April 15, 2010, FAA Airports Law Branch sent a letter granting Respondent's request for an extension of time to file Answer. Respondent's Answer due May 17, 2010. [FAA Exhibit 1, Item 5.]

On May 17, 2010, the Respondent filed its Answer, Motion to Dismiss and Affirmative Defense. [FAA Exhibit 1, Item 6.]

On May 26, 2010, the Complainant filed a request for an extension of time to reply to Motion to Dismiss. [FAA Exhibit 1, Item 7.]

On May 26, 2010, a letter from Respondent to FAA does not object to Complainant's Motion for an Extension of Time to File a Reply until June 28, 2010. [FAA Exhibit 1, Item 8.]

On May 26, 2010, FAA Airports Law Branch sent a letter granting Complainant's request for extension of time to file it reply. Reply due June 28, 2010. [FAA Exhibit 1, Item 9.]

On June 28, 2010, the Complainant filed its Opposition (Reply) to Respondent's Motion to Dismiss. [FAA Exhibit 1, Item 10.]

On June 30, 2010, the Respondent filed a Motion for Extension of Time to File a Rebuttal. [FAA Exhibit 1, Item 11.]

On July 1, 2010, FAA Airports Law Branch sent a letter granting the Respondent's Request for Extension of Time for Rebuttal. Rebuttal due July 20, 2010 [FAA Exhibit 1, Item 12.]

On July 20, 2010, the Respondent filed a Rebuttal to Complainant's Reply. [FAA Exhibit 1, Item 13.]

IV. ISSUES

Upon review of the allegations and the relevant airport-specific circumstances, summarized above in the Background Section, the FAA Director of the Office of Airport Compliance and Field Operations, has determined that the following issues require analysis to provide for a complete review of the Respondent's compliance with applicable federal law and policy.

Issue 1: Whether the Respondent is presently in violation of its FAA Grant Assurances issued under the Airport Improvement Program (codified at 49 U.S.C. § 47107), including Grant Assurance 1, *General Federal Requirements*; Grant Assurance 30, *Civil Rights*; and Grant Assurance 37, *Disadvantaged Business Enterprises*, and 49 CFR Part 26 (as incorporated into the grant assurances, by establishing race conscious DBE goals on federally funded projects after October 1, 2008.

Issue 2: Whether the Respondent retaliated against the Complainant in violation of 49 CFR § 26.109 as a result of the Part 16 Complaint filed against Respondent.

V. APPLICABLE FEDERAL LAW AND POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by grant agreement or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, and the FAA Airport Compliance Program.

A. Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Part 16 of Title 14 of the Code of Federal Regulations (14 CFR Part 16) contains the rules of practice for filing complaints involving federally assisted airports. [See *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings*, 61 Fed. Reg. 53998 (October 16, 1996).] Complaints may be filed under Part 16 alleging violations of the federal grant assurances under 49 U.S.C. § 47107 or § 47113 for airports receiving federal airport improvement program funds.

The standard federal grant assurances contain a civil rights assurance⁶⁶ and a Disadvantaged Business Enterprise (DBE) assurance,⁶⁷ as well as the express requirement to comply with 49 CFR Parts 26 and 23 under Grant Assurance 1, *General Federal Requirements*.

Title 49 U.S.C. § 47113 provides authority for 49 CFR Part 26 and requires that “The Secretary of Transportation shall take affirmative action to ensure that an individual is not excluded because of race, creed, color, national origin, or sex from participating in an activity carried out with money received under a grant under this subchapter. The Secretary shall prescribe regulations necessary to carry out this section.”

Part 26 of 49 CFR contains the Department of Transportation regulations for its DBE program with respect to Department of Transportation-assisted contracts. [See *Participation by Disadvantaged Business Enterprises in the Department of Transportation Financial Assistance Programs*, 64 Fed. Reg. 5096 (February 2, 1999).] Part 26 applies to recipients of Federal Airport Funds authorized by 49 U.S.C. § 47101, *et seq.* [See 49 CFR § 26.3(a) (3).] Part 26 does not apply to contracts in which the Department of Transportation does not participate in financial assistance. [See 49 CFR § 26.3(d).] Part 26 replaced 49 CFR Part 23 for DBEs in Department of Transportation-assisted contracts; DBE airport concessions provisions of 49 CFR Part 23 were revised and updated in the Department’s regulation entitled *Part 23-Participation of Disadvantaged Business Enterprise in Airport Concessions*. [See 70 Fed. Reg. 14496 (March 22, 2005).]

The sections of 49 CFR Parts 23 and 26 applicable to this Part 16 proceeding include §§ 23.1, 23.3, 23.9, 23.11, 23.57, 23.59, 23.61, 23.79, 26.7, 26.101, 26.105 and 26.109.

Title 49 CFR § 26.7 states:

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.
- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

The regulation in 49 CFR § 26.7 prohibits not only intentional discrimination but also actions that have the effect of discriminating against individuals on one of the prohibited grounds (e.g., that have a disparate adverse impact on members of a particular group). The language of paragraph (b) is similar to that in the Department’s longstanding Title VI regulation (49 CFR § 21.5(b)(2)) and is consistent with court interpretations of nondiscrimination statutes in other

⁶⁶ Grant Assurance 30, *Civil Rights*.

⁶⁷ Grant Assurance 37, *Disadvantaged Business Enterprises*.

contexts. [See Supplemental Notice of Rulemaking 62 FR 29548, 29551 (May 30, 1997) citing *Alexander v. Choate*, 469 U.S. 287 (1985); *Elston v. Talladega Board of Education*, 997 F.2d 1394 (11th Cir., 1993).] Therefore, to analyze the allegations in this case, we will consider two primary theories of discrimination under Title VI: intentional discrimination or disparate treatment, and disparate impact or adverse effects.

The regulation in § 26.45 states in pertinent part,

(a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(c) Step 1. You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(5) Alternative methods. You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

The regulation in § 26.51, states, in part:

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

The regulation in § 26.51(f), states, in part:

To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal. The regulations in 49 CFR §§ 26.101 and 26.105 cover FAA's enforcement authorities in the event FAA finds the recipient in noncompliance.

The regulation in § 26.101(a) states:

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement actions under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of federal funds, or refusal to approve projects, grants, or contracts until deficiencies are remedied. Program sanctions may include...in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122.

The regulatory provision in § 26.105 specifically provides for enforcement actions in FAA programs, as follows:

- (a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- (b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.
- (c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

Finally, the requirements found in § 26.109(d) regarding retaliation provide:

(d) If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the 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. 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.

Federal Grant Assurances 1, *General Federal Requirements*; 30, *Civil Rights*; and 37, *Disadvantaged Business Enterprises*, apply to the circumstances set forth in this Complaint.

Grant Assurance 1, *General Federal Requirements*, states

[The airport sponsor] will comply with all applicable federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of federal funds for this project including but not limited to the following:

Federal Legislation (in pertinent part):

k. 49 CFR Part 23 - Participation by Disadvantage Business Enterprise in Airport Concessions.

m. 49 CFR Part 26 – Participation by Disadvantaged Business Enterprises in Department of Transportation Programs.

Grant Assurance 30, *Civil Rights*, states:

[The airport recipient] will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which federal financial assistance is extended to the program, except where federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or (b) the period during which the sponsor retains ownership or possession of the property.

Grant Assurance 37, *Disadvantaged Business Enterprises*, states:

The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801).

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the obligations an airport owner accepts when receiving federal grant funds or the transfer of federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with federal laws. The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' 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 pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6B, *Airport Compliance Manual* (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 to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will

make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01); upheld in *Wilson Air Center, LLC v. FAA*, 372 F.3d 807 (C.A. 6, June 23, 2004).]

The Order covers all aspects of the airport compliance program except enforcement procedures, which are found in *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). Under 49 CFR § 26.105(b), any person who knows of a violation of Part 26 by a recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

On February 22, 2002, the Director of the Office of Airport Safety and Standards (now the Director of Airport Compliance and Field Operations) delegated to the Deputy Assistant Administrator for Civil Rights the authority to prepare and issue director's determinations pursuant to 14 CFR Part 16. [FAA Exhibit 1, Item 16.] [See *Albuquerque Valet Parking Service, Norma G. Morris and David Powdrell, v. City of Albuquerque, Albuquerque, NM*, FAA Docket No. 16-01-01 Final Agency Decision and Order, at footnote 3; upheld in *Albuquerque Valet Parking Service v. FAA*, Civ. No. 03-575 (D.C. New Mexico, March 31, 2004).] The Deputy Assistant Administrator for Civil Rights position is currently vacant without an acting official and, therefore, the Director of Airport Compliance and Field Operations is the decision maker for the purposes of issuing the initial decision for the case herein.⁶⁸

VI. ANALYSIS AND DISCUSSION

In this Complaint, the role of the FAA is to determine:

Issue 1: Whether the Respondent is presently in violation of its FAA Grant Assurances issued under the Airport Improvement Program (codified at 49 U.S.C. § 47107), including Grant Assurance 1, *General Federal Requirements*; Grant Assurance 30, *Civil Rights*; and Grant Assurance 37, *Disadvantaged Business Enterprises*, and 49 CFR Part 26 (as incorporated into the grant assurances, by establishing race conscious DBE goals on federally funded projects after October 1, 2008.

Issue 2: Whether the Respondent retaliated against the Complainant in violation of 49 CFR § 26.109 as a result of the Part 16 Complaint filed against Respondent.

The FAA has determined that the Complainant does have standing to file a complaint under Part 14 CFR Part 16, contrary to the Respondent's allegation in its Answer and Rebuttal. Title 49 CFR § 26.105(c) presents an exception to the requirement that a

⁶⁸ The Director of Airport Compliance and Field Operations in the absence of a Deputy Assistant Administrator for Civil Rights will serve as the decision maker for the issuance of the initial decision for this instant case.

complainant must prove standing under 14 CFR § 16.23(a). Thus, any person who knows of an airport sponsor's violation of the rules under 49 CFR Part 26 – which covers participation by DBEs in DOT's financially assisted programs – may file a Part 16 complaint. The Complainant is therefore entitled to file the Complaint in accordance with 49 CFR § 26.105(c) and does not have to be directly and substantially affected by any alleged noncompliance by the recipient.

In accepting federal airport development funds, an airport owner assumes certain obligations, memorialized in the grant assurances, which include the responsibility to comply with 49 CFR Parts 23 and 26 as incorporated in Grant Assurances 1, *General Federal Requirements*; 30, *Civil Rights*; and 37, *Disadvantaged Business Enterprises*. The Respondent has signed grant agreements containing the applicable assurances and is, therefore, subject to its grant assurance obligations. The FAA has authority under 14 CFR Part 16 and 49 CFR Parts 23 and 26 to obtain relief for violations of the DBE Program.

In the event of findings of noncompliance by FAA, compliance orders may be issued which may include terminating eligibility for grants pursuant to 49 U.S.C. §§ 47106(e) and 47111(d), suspending the payment of grant funds, withholding approval of any new application to impose a passenger facility charge, a cease and desist order, directing the refund of fees unlawfully collected, or any other compliance order to carry out the provisions as defined in 14 CFR § 16.3.

The Respondent is correct in noting that the FAA is without authority to award money damages to the Complainant for the claims he seeks herein. The FAA has enforcement authority over an airport sponsor, but, generally, has no authority to award damages to persons subjected to an airport sponsor's noncompliance with its grant assurances. [See, e.g., *Martyn v. Port of Anacortes*, FAA Docket No. 16-02-03 (Director's Determination, 2003).] While the Complainant has requested an award of money damages, the sum of damages alleged to be suffered by the Complainant is not under review in this Part 16 proceeding. Accordingly, the Complainant's request for monetary and equitable damages is denied.

The Director will now proceed with the review of the two stated issues.

Issue 1: Whether the Respondent is presently in violation of its FAA Grant Assurances issued under the Airport Improvement Program (codified at 49 U.S.C. § 47107), including Grant Assurance 1, *General Federal Requirements*; Grant Assurance 30, *Civil Rights*; and Grant Assurance 37, *Disadvantaged Business Enterprises*, and 49 CFR Part 26 (as incorporated into the grant assurances, by establishing race conscious DBE goals on federally funded projects after October 1, 2008).

The Complainant alleges Jackson Municipal Airport Authority (JMAA) failed to adhere to the rules, regulations, grant conditions, written and implied grant assurances of signed

financial agreements with the United States Department of Transportation (DOT) under the Airport Improvement Program (AIP). The Complainant asserts the JMAA DBE program is not narrowly tailored as it relates to goal setting on federal and state assisted projects and contracts from October 1, 2008, through February 25, 2010.⁶⁹ The elements of a narrowly tailored program derive from the analysis of cases decided under Disadvantaged Business Enterprise law. [See, *Adarand Constructors v. Pena*, 515 U.S. 200, 235, (1995); and *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).] The Complainant alleges that goals set on federal and state assisted projects by JMAA lacked the requisite findings to justify the percent of DBE participation. Furthermore, the Complainant reported the Respondent set race conscious goals on every project contracted out without regard to any definitive goal setting methodology. The Complainant asserts that he compiled all goals and goal methodologies submitted by the Respondent. [FAA Exhibit 1, Item 6, exhibit 25.] However, the Complainant contends that many of the goals included in the annual reports were not the goals published to the general public and in most cases the goals advertised were higher.⁷⁰ The Complainant claims that the indiscriminate setting of goals on all federal and state projects/contracts by ignoring goal achievement data is in direct violation of Sections 26.13(a), 26.7(b), 26.45(5)ii, and 26.51(a)(2). The Complainant states in his Reply that the Respondent has “misplaced DBE goals on all none [sic] federally funded projects” and that this practice removes the option of measuring race neutral accomplishment. Thus, all projects become race conscious.⁷¹ The Complainant also contends the Respondent carelessly established race conscious goals on all projects indiscriminately, which in turn imposed a non-level playing field and an undue burden on non-DBE firms. Therefore, the Complainant recommends the Respondent be sanctioned under various sections, including sections 26.13(a), 26.7(b),; 26.45(5)ii; 26.45(f)(4); and 26.51(a)(2). . There are no sanctioning provisions within section 26.7(b), 26.45(5)ii, or 26.45(f)(4). Section 26.51(a)(2) does not exist, nor are there sanctioning provisions within section 26.51).⁷²

The Respondent disputes the allegations, arguing that the Complainant’s allegations have not been proven by any reliable, probative, and substantial evidence as is required in 14 CFR § 16.227. The Respondent retorts that the Complainant did not cite in his Complaint any specific DBE goal in any federally funded project from October 1, 2008, to the present that he claims to be “race conscious” and therefore in violation of Part 26.⁷³ The Respondent readily admits that establishing and implementing DBE goals is not a precise science. On June 9, 2010, the Respondent provided documentation of its goal setting methodology to the Complainant.⁷⁴ The Respondent contends that its goal setting methodology is broad based and inclusive. In an April 20, 2010, memorandum to the Complainant, DBE Director Mr. Thomas directs the Complainant to “identify currently certified Mississippi Unified Certification Program MS UCP DBEs and include them in

⁶⁹ The Complainant makes this assertion in his Complaint as Point #5.

⁷⁰ The Complainant makes this assertion in his Reply under “Argument,” page 19. Complainant also references exhibits 33, 33A and/or 33B and 33C in his Reply as evidence.

⁷¹ The Complainant makes this assertion in his Reply under “Argument,” page 20.

⁷² The Director notes further sanction provisions are included in 49 CFR §§ 26.105 and 26.107.

⁷⁴ FAA Exhibit 1, Item 13, exhibit 42.

your methodology.”⁷⁵ The Respondent adds the Complainant should be more “detailed and purposeful” in seeking DBE participation. In its Answer, the Respondent provided the FY 2006-FY 2010 DBE Annual Reports filed with FAA.⁷⁶ The Respondent asserts the Complainant simply disagrees with the methodology used to establish DBE goals. The Respondent concludes that it has provided evidence to justify the methodologies used to establish DBE project goals after October 1, 2008, and that the record does not support a finding of noncompliance with FAA Federal Grant Assurances.

The record of evidence shows the Respondent is in compliance with FAA Federal Grant Assurances 30, *Civil Rights*; and 37, *Disadvantaged Business Enterprises*; and is in compliance with 49 CFR Part 26.

In the instant case, the Director finds that the Respondent set DBE goals according to 49 CFR § 26.45, which outlines the goal setting process for recipients; and 49 CFR § 26.51, which addresses race-neutral means to meet overall goals.⁷⁷ Specifically, the Respondent set a goal of 16.96 percent for FY 2006, of which 9.64 percent was derived from race-conscious means and 7.32 percent of that goal was derived from race-neutral means. The 23-page document containing the methodology sets forth in detail the application of the process of the steps contained in the regulations and specifically analyzes the race-neutral means used to increase the DBE participation.⁷⁸ The Respondent provided multiple examples of how the base figure for the relative availability of DBEs may be established. Per 49 CFR § 26.45(c), the examples cited in the regulations are not intended to be exhaustive lists. In addition, as long as the Airport Concession Disadvantaged Business Enterprise (ACDBE) and DBE goals, respectively, are based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate, an airport may use any methodology to achieve that goal.⁷⁹ The Respondent carried out its responsibility by not discriminating against persons on the grounds of race, color, sex or national origin, nor by exclusion from participation in any airport activity benefiting from federal funding by following the requirements in 49 CFR Part 26. The record of evidence shows that the Respondent, through its goal setting methodologies, took reasonable steps to ensure nondiscrimination on the basis of race, color, sex, or national origin in the award and performance of any federally assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The Director finds that the Respondent practiced good faith efforts and exercised due diligence through a self-assessment⁸⁰ that identified functional areas in need of improvement i.e., contracting, certification, outreach, and ACDBE concessions.⁸¹ The areas identified as needing improvement, in and of

⁷⁵ FAA Exhibit 1, Item 13, exhibit 39.

⁷⁶ FAA Exhibit 1, Item 10, exhibit 25; overall goals and race conscious/race neutral goal splits are provided for FY 2006-2010. In addition, overall goals and actual goals for FY 2002-2005 are provided.

⁷⁷ FAA Exhibit 1, Item 6, exhibit 25 (III); Respondent addresses its race-neutral methodology.

⁷⁸ FAA Exhibit 1, Item 6, exhibit 25, page 8.

⁷⁹ FAA Exhibit 1, Item 6, exhibit 25, is the Respondent’s goal setting submittal to the FAA for FY 2006-FY 2008. Goal setting methodologies are included.

⁸⁰ Respondent used a DBE Program Review.

⁸¹ FAA Exhibit 1, Item 6, exhibit 13.

themselves, do not translate into noncompliance with Part 26. Furthermore, the Respondent has demonstrated a commitment to upgrade its DBE Program.

Contrary to the Complainant's assertion that the Respondent has failed to adhere to the rules, regulations, grant conditions, written and implied grant assurances of signed financial agreements with the Department of Transportation and the FAA, the Director finds that the Respondent carried out its responsibility by providing opportunities for DBE participation without discrimination. [See *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007). The record makes it clear the Respondent uses nearly all of the methods described in 49 CFR § 26.51(b) to maximize the portion of the goal that will be achieved through race-neutral means. Among other methods, JMAA has sponsored community outreach sessions targeting existing and prospective DBE firms, inserted public notices in local newspapers in reference to DBE goals for comment, and polled business leaders in reference to bonding, insurance, loans, etc.⁸²

Accordingly, the Director finds that the Complainant has failed to demonstrate that the Respondent has not maximized the portion of its goal that will be met through race-neutral means. The Complainant has not identified any specific DBE goal in any federally funded project from October 1, 2008, to the present that he asserts to be "race conscious" and thus in violation of 49 CFR Part 26. This failure, in addition to the failure to demonstrate the Respondent did not maximize the portion of its goal that would be met through race neutral means, reflects the Complainant's broader inability to demonstrate that JMAA's DBE program is in violation of FAA Grant Assurances issued under the Airport Improvement Program (codified at 49 U.S.C. § 47107), including Grant Assurance 1, *General Federal Requirements*; Grant Assurance 30, *Civil Rights*; and Grant Assurance 37, *Disadvantaged Business Enterprises*, and 49 CFR Part 26 (as incorporated into the grant assurances, by establishing race conscious DBE goals on federally funded projects after October 1, 2008.

The FAA is encouraged by the actions taken by the Respondent to review and upgrade its DBE Program. The FAA is convinced that the Respondent has satisfied its burden of demonstrating that its program is narrowly tailored. Therefore, the Complainant's assertion that the Respondent has violated FAA grant assurances is dismissed.

Issue 2: Whether the Respondent retaliated against the Complainant in violation of 49 CFR § 26.109 as a result of the Part 16 Complaint filed against Respondent.

The Complainant alleges the Respondent has excluded him from important meetings, isolated him from others, and denied him the appropriate and normal supervision that others in a comparable position receive. The Complainant asserts in his Reply that he has

⁸² Respondent performed a survey in 2003 with a Mississippi minority contractors association to determine what impact bonding, insurance, and other financial requirements have on DBEs receiving and completing jobs. Results emphasized the need for short term accounts receivable and inventory financial assistance in order to sustain and grow DBE businesses. There was an initial consensus that joint venture agreements would lessen the strain on participating minority small businesses allowing them to gain much needed access to financial resources and other opportunities.

“experienced total isolation and disparate treatment i.e. being treated and compensated differently than other employees in similar positions within the organization.”⁸³ In his Reply, the Complainant claims that the Respondent’s “bad faith behaviors have damaged my character.” In addition, the Complainant alleges that the Respondent has a vendetta against him because of his whistle blowing activities with the JMAA Board.⁸⁴ The Complainant asserts he often finds out about DBE and department sponsored activities from the newspaper or from people in the community.

Additionally, the Complainant asserts the Respondent failed to respond to his legitimate and legally recognized recommendations in reference to the JMAA DBE Program.⁸⁵ The Complainant claims in his Reply that the Respondent ignores his recommendations for the sake of marginalizing his role in the organization. The Complainant asserts in his Reply that his “Trip Report” dated March 25, 2008, from the FAA Southern Region’s Civil Rights External Program Training so infuriated the JMAA Board that the Board immediately began the process of advertising for a DBE Liaison Officer.⁸⁶

The Complainant asserts in his Reply that DBE Director Mr. Thomas has shifted the “spotlight” from the message to the messenger and, therefore, has exemplified the first rule of retaliation.⁸⁷ In addition, the Complainant states that he feels that he has been branded as incompetent.⁸⁸ Moreover, the Complainant accuses the Respondent of intimidation through abuse of power and isolation. In his Reply, the Complainant views his performance evaluations as unjustified. The Complainant asserts he has never received a poor or negative performance evaluation prior to his whistle blowing filing.⁸⁹

The Respondent contends the Complainant has not supplied evidence to demonstrate retaliation against him as a result of his Part 16 Complaint filing. In reference to employee isolation, the Respondent asserts in its Answer that the Complainant is a regular participant in weekly staff meetings where the development of the Capital Budget is freely discussed.⁹⁰ The Respondent asserts it has definitive and affirmative actions to ensure there has been no retaliation against the Complainant.⁹¹ In a September 24, 2009, JMAA Board Meeting, the Board considered whether the Complainant would claim his negative performance evaluations in his September 23, 2009, Performance Review, his Job Duties and Salary Assessment, and the DBE Program Review had been in retaliation

⁸³ FAA Exhibit 1, Item 1. Complainant makes this assertion within the body of his Complaint.

⁸⁴ FAA Exhibit 1, Item 10, exhibit 21 (Summary).

⁸⁵ FAA Exhibit 1, Item 10, exhibit 11; Complainant prepared a DBE Compliance Monitoring Manual.

⁸⁶ The Complainant makes this assertion in his Reply as proviso for retaliation. The Respondent’s memorandum reply to the Complainant’s Trip Report is found in the Rebuttal. [FAA Exhibit 1, Item 13, exhibit 59.]

⁸⁷ FAA Exhibit 1, Item 10, exhibit 21(Summary).

⁸⁸ FAA Exhibit 1, Item 10, exhibit 17, page 4.

⁸⁹ Id. The Complainant appears adamant about his assertion of retaliation. FAA Exhibit 1, Item 10, exhibit 4 is a performance evaluation performed by Complainant’s supervisor Ms. Wilson for the period August 1, 2007, to March 31, 2008, in which Ms. Wilson concludes the Complainant has performed “adequately.” The Complainant disagrees and responds that he believes he has performed “far above adequately.”

⁹⁰ FAA Exhibit 1, Item 6, exhibit 3.

⁹¹ FAA Exhibit 1, Item 6, exhibit 21.

for his Complaint against the Respondent.⁹² The JMAA DBE Director and the JMAA CEO assured the Board that the Complainant's performance evaluation accurately reflected the Complainant's job performance as Compliance Analyst and that it was an honest assessment. In addition, the DBE Director and JMAA CEO asserted that the deficiencies noted in the evaluations were not cited in retaliation for his prior Complaint.⁹³ Moreover, the Respondent asserts that the Complainant has the same position and basic job responsibilities that he had at the time he filed his first Complaint on September 29, 2008. In its Answer, the Respondent also asserts the Complainant's compensation has increased during the period of his Complaint.⁹⁴

In its Answer, the Respondent argued that the Complainant's low rated performance appraisal evaluations during the period of his Complaint are an accurate measure of the Complainant's job performance. In addition, the Respondent argues that the Complainant's supervisor has not ignored his programmatic recommendations and has "acknowledged periodic statements the Complainant has made about the JMAA DBE Program and how it could be improved."⁹⁵ Furthermore, the June 24, 2009, Review and Feedback Evaluation of Complainant by DBE Director Jack Thomas reveals "during this appraisal period you have brought several issues to my attention which may have constituted poor administrative practices, pursuant to the DBE Guidelines. I encourage you to continue this practice."⁹⁶ The Respondent also asserts it has not prevented or attempted to prevent the Complainant from making any complaint he has made or that he may want to make in the future. Moreover, in its Answer, the Respondent denies any attempt at intimidation, coercion, or discrimination against the Complainant.⁹⁷

The Respondent argues the Complainant's negative performance evaluations are deserved and demonstrates Respondent's efforts to encourage Complainant to do a better job of ensuring technical compliance by JMAA under Parts 23 and 26.

The Director notes the Complainant claimed in his Reply that he experienced disparate treatment and was compensated differently from employees in similar positions within the organization.⁹⁸ The analysis of intentional discrimination is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. [See *U.S. Department of Justice Title VI Legal Manual*, at 42 (January 11, 2001), citing: *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1405 n. 11 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993); *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 582 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417, (11th

⁹² FAA Exhibit 1, Item 6, exhibit 14.

⁹³ FAA Exhibit 1, Item 6, exhibit 16.

⁹⁴ The Respondent asserts the Complainant has received a salary increase during the period covered by his Complaint. Respondent has not provided documentation indicating a positive salary adjustment during period of complaint for the record.

⁹⁵ FAA Exhibit 1, Item 6, exhibit 12.

⁹⁶ FAA Exhibit 1, Item 6, exhibit 10.

⁹⁷ In its Answer, the Respondent denies intimidation, coercion, and/or discrimination against the Complainant

⁹⁸ Complainant makes this assertion within the body of his Complaint.

Cir. 1985).] To prove intentional discrimination, one must show that “a challenged action was motivated by intent to discriminate.” [Elston, 997 F.2d at 1406.] It does not require evidence of “bad faith, ill will or any evil motive on the part of the [recipient].” [Elston, 997 F.2d at 1406 (quoting *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).] Intentional discrimination claims may be analyzed using the Title VII burden shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973).

In applying the framework established in *McDonnell Douglas*, the complainant must first raise an inference of discrimination by establishing a prima facie case of discrimination. In the instant case, the Director finds that the Complainant has not established a prima facie case of discrimination based on the evidence of record. The Complainant has not provided examples of other similarly situated employees that receive a higher salary. In the matter of compensation, the Respondent initiated a salary and benefits survey at the direction of the JMAA Board in response to the Complainant’s claim of unfair compensation.⁹⁹ The survey concluded the Complainant receives compensation that is approximately equal to his peers. The Director has determined the survey was enacted in good faith and it provided substantial proof of fair compensation for the Complainant based on his current job classification. The Complainant has not rebutted this evidence nor has the Complainant demonstrated that such reasoning is a pretext for discrimination. Accordingly, the Director finds that the Complainant has not met his burden of proof, and the record does not contain evidence to support the Complainant’s allegation that the Respondent discriminated against him.

The Complainant claims that the Respondent violated 49 CFR § 26.109(d) by retaliating against him for his filing of this Part 16 Complaint. The Director finds the Respondent’s alleged actions, or lack of actions, individually or cumulatively, were not contrary to the administrative, general, and compliance requirements of 49 CFR § 26.109(d). In order to make a prima facie showing that a given action by the Respondent violated 49 CFR § 26.109(d), the Complainant has the burden of proof to show retaliatory aforethought by the Respondent. To do this, the Complainant must show a causal connection between the Respondent’s treatment of him after filing his Complaint and treatment before filing the Complaint. The Director notes the Complainant states “I never received a poor or negative evaluation prior to this whistle blowing experience.”¹⁰⁰ The Director notes that the Complainant’s performance evaluation for the period August 1, 2007, to March 31, 2008, was rated “performing adequately in areas that you have been asked to manage and oversee.”¹⁰¹ The Complainant clearly states in his Reply that “the ‘Complaint of record’ is not an employee related issue of concern.”¹⁰² The Complaint provides no other evidence of retaliation by the Respondent. Without probative or substantial evidence, the

⁹⁹ FAA Exhibit 1, Item 6, exhibit 15.

¹⁰⁰ FAA Exhibit 1, Item 6, exhibit 17.

¹⁰¹ FAA Exhibit 1, Item 10, exhibit 4.

¹⁰² FAA Exhibit 1, Item 10, paragraph 16 and unnumbered paragraph on page 35. The Complainant asserts in his Reply that his Complaint is not an employee related issue and thus is not the driving force behind his Complaint. However, retaliation is a form of discrimination prohibited under the grant assurances and, therefore, is a claim that warrants investigation under the Part 16 process. Accordingly, the issue is analyzed herein.

Complainant is unable to establish a causal link between his treatment as an employee of JMAA and the filing of his Complaint. Further, the Director finds the Complainant's claim of retaliation by way of exclusion is not supported by reliable evidence. The Respondent's evidence contained in FAA Exhibit 1, Item 10, exhibit 3, clearly shows the Complainant was included in meetings with the CFO, the Purchasing Agent, the technical staff concerning software design, and Facilities/Finance. Complainant was a member of the weekly senior staff meetings to develop Operations and Maintenance plans and the Capital Budget. Records of the Board of Commissioners meetings show Complainant attends regularly.¹⁰³ The substantial evidence shows the Respondent did not discriminate against the Complainant by excluding him from participating in airport meetings and functions.

The Director finds no violation by the Respondent of 49 CFR § 26.109(d), and this issue is dismissed.

In conclusion, the Director finds the Respondent is in compliance with the requirements in 49 CFR Parts 23 and 26, and FAA Grant Assurances 30, *Civil Rights*, and 37, *Disadvantaged Business Enterprises*.

VII. FINDINGS AND CONCLUSION

Upon consideration of the submissions and responses by the parties, the entire record herein, and the applicable law and policy, and for the reason stated above, the Director finds and concludes as follows:

The Respondent is not currently in violation of the requirements of 49 CFR Parts 23 and 26 as they relate to grant assurances 1, *General Federal Requirements*; 30, *Civil Rights*; and 37, *Disadvantaged Business Enterprises*; by establishing race conscious DBE goals on federally funded projects after October 1, 2008.

- The Respondent did not retaliate against the Complainant in violation of 49 CFR § 26.109 as a result of the Part 16 Complaint filed against Respondent.

VIII. ORDER

Accordingly, it is ordered that:

- 1) The Complaint is dismissed with prejudice; and
- 2) All motions not expressly granted in this Determination are denied.

¹⁰³ FAA Exhibit 1, Items 17, 18, 19 and 20.

RIGHT OF APPEAL

The Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review (14 CFR § 16.247(b)(2)). A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the attention of the FAA Assistant Administrator for Civil Rights pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination. Any appeal should be forwarded to the FAA Office of the Chief Counsel, Attn: FAA Part 16 Airport Proceedings Docket, AGC-610, Room 925, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591.



Randall S. Fiertz
Director, Office of Airport Compliance
and Field Operations

January 18, 2011

Date

