

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Hilton A. Turner, Jr.,
Complainant
v.
City of Kokomo, Indiana,
Kokomo Board of Aviation
Commissioners,
Respondents

FAA Docket No. 16-98-16

FINAL DECISION AND ORDER

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports as an appeal by Hilton A. Turner, Jr. (Complainant), from the Director's Determination (DD) of March 30, 1999, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings (14 CFR Part 16)¹.

PROCEDURAL HISTORY

On September 24, 1998, Mr. Hilton A. Turner, Jr., filed a complaint against the City of Kokomo, Indiana (Respondent), alleging that the City granted an exclusive right to Flying Eagle Aviation, Inc., contrary to its Federal grant assurances and 49 U.S.C. Section 40103(e) and also violated 49 U.S.C. Section 47107, *et seq.*, and the corresponding Federal grant assurance which requires that Federally funded airports be available for public use on fair and reasonable terms and without unjust discrimination.

The complaint alleged that the Respondent granted an exclusive right to Flying Eagle Aviation, Inc., on the public taxiways and the ramp area near the terminal building, by allowing Flying Eagle to provide commercial-refueling for its customer's aircraft, the self-refueling of its own aircraft, and to provide other aeronautical services.

The complainant also alleged that the City's actions establish a restraint on trade and are in violation of the Sherman Act. Additionally, he alleges that the City's fuel flowage fee places an unreasonable burden on gasoline delivered in interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

¹ The March 30 Director's Determination contains two typographical errors in which the prefix "non" and the word "no" were included inadvertently. Thus, on page 11, second full paragraph ("Mr. Turner also has ..."), fourth line, the last word "noncompliance" should read "compliance." On page 12, third full paragraph ("Thus, it is clear ..."), seventh line, the phrase "... there is no exclusive right ..." should read "... there is an exclusive right"

The complainant further alleges that the Respondent singled him out for an enforcement action because he is an African-American, which he claims is in violation of 42 U.S.C. Section 1983, and the Fourteenth Amendment of the United States Constitution.

FACTUAL BACKGROUND

On September 27, 1993, the Kokomo Board of Aviation Commissioners signed a Lease and Operating Agreement with Flying Eagle Aviation, Inc. [Exhibit 1, Item 1, Exhibit B]

On April 10, 1995, the Board of Aviation Commissioners adopted and published the "Minimum Standards and Requirements for the Aeronautical Use of the Kokomo Municipal Airport" and "Rules and Regulations", effective June 1, 1995. [Exhibit 1, Item 8]

On May 27, 1996, the Board of Aviation Commissioners signed a Lease Extension for the Lease and Operating Agreement with Flying Eagle Aviation, Inc. [Exhibit 1, Item 1, Exhibit A]

On June 1, 1996, the Airport Manager, Mr. Ron Gilbert, found Mr. Turner in violation of Section 3(A)(3) of Kokomo Municipal Airport Rules and Regulations, and non-compliance with Airport Minimum Standards and Requirements, for self-fueling in an area other than the self-fueling area designated by Kokomo Board of Aviation Commissioners. [Exhibit 1, Item 1, Exhibit C]

On July 22, 1996, the Airport Manager, Mr. Ron Gilbert, again cited Mr. Turner for violating Section 3(A)(3) of the Kokomo Municipal Airport Rules and Regulations, and non-compliance with Airport Minimum Standards and Requirements, for self-fueling in an area other than the self-fueling area designated by Kokomo Board of Aviation Commissioners. [Exhibit 1, Item 1, Exhibit C]

On December 2, 1996, the City of Kokomo Corporation Counsel, Mr. Kerineth J. Ferries, filed an action against Mr. Turner in Howard Superior III Court, Indiana, to collect \$300 in fines for the above referenced citations. [Exhibit 1, Item 1, Exhibit C]

On or about June of 1996, the Flying Eagle Aviation, Inc. had a fuel spill. [Exhibit 1, Item 6]

On June 27, 1998, a fuel truck owned by Flying Eagle Aviation, Inc. caught fire and the fire was extinguished. [Exhibit 1, Item 6]

On March 30, 1999, the Director of the FAA Office of Airport Safety and Standards determined that the City of Kokomo was not in violation of its Federal obligations regarding Exclusive Rights as set forth in 49 U.S.C. § 40103(e), 47107(a)(4) or Economic Nondiscrimination as set forth in 49 U.S.C. § 47107(a)(1),(5). [FAA Exhibit 1, Item 1]

On April 27, 1999, Mr. Turner filed a timely appeal of the Director's Determination to the FAA's Associate Administrator for Airports. The appeal raised no new issues of fact, but rather reiterated allegations stated in the Complaint. Mr. Turner argues on appeal that the Director denied him due process of law in making the Determination and also stated that the Director's conclusions in the Determination are unsupported by substantial evidence in the record. [FAA Appeal, Exhibit 1, Item 2]

In concluding that he was denied due process, Mr. Turner alleges that the Director failed to consider specific facts in making the Determinations. These facts are discussed below.

The City of Kokomo indicated that it elected not to respond to the appeal in a July 8, 1999, telephone conversation between C. Keith Pettigrew, counsel for the City, and Kathleen Brockman, FAA Compliance Officer, Office of Airports. Mr. Pettigrew advised that he had determined that no new issues had been raised by the Complainant on appeal and that there was no further information that the City could submit in response to the Complainant's allegations.

APPLICABLE LAW AND POLICY:

The Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the safety, security and development of the civil aviation.

This Federal role has been augmented by various legislative actions, including the Airport and Airway Improvement Act of 1982, as amended (AAIA) 49 U.S.C. Section 47101, et seq., which authorize programs for providing 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 contract or by restrictive covenants in property conveyance, or Airport Improvement Program (AIP) grant agreements, binding the sponsor upon acceptance of the Federal assistance. These contractual obligations are an important factor in maintaining a viable national airport system.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor obligations. See *e.g.*, the Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. sections 40101, 40113, 40114, 46101, 46104, 46105, 46106, and 46110, and the Airport and Airway Improvement Act of 1982, as amended (AAIA), 49 U.S.C. sections 47105(d), 47106(d), 47107(1), 47111(d), and 47122.

Enforcement procedures regarding airport compliance matters are set forth in the FAA Rules of Practice for Federally-Assisted Airport Proceedings (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 Federal Register 53998, October 16, 1996) and were effective on December 16, 1996. The complaint, answer, reply and rebuttal in this case were filed with the FAA pursuant to 14 CFR Section 16.29. Based on the investigation, pleadings, and applicable law and policy, the Director of Airport Safety and Standards issued the Record of Determination (ROD)

dismissing the complaint pursuant to 14 CFR Section 16.31. The present appeal to the Associate Administrator of Airports will be handled under 14 CFR, Section 16.31(c).

ISSUES PRESENTED ON APPEAL

The Complainant raises no new issues in the appeal, but rather restates allegations that were previously addressed in the Director's Determination. The Complainant presents eleven (11) items, listed below, that he alleges the Director failed to consider in reaching his March 30 Determination:

1. The Complainant is a member of a suspect class.
2. Cedar Crest Enterprises was a private operator of non-suspect classification and is relevant to this proceeding.
3. The anti-competitive acts of Respondents (City of Kokomo), including:
 - The contract between the Respondents and Eagle that fixes certain prices for the use of the airport.
 - The discriminatory requirement for the Complainant to obtain written permission prior to self-refueling and then paying the non-discriminatory eight-cent airport user fee violates the Commerce Clause of the U.S. Constitution.
 - The discriminatory six-cent per gallon fuel burden incurred by the Complainant, when moving to and from the designated self-fueling area.
4. The Respondents executed an illegal written contract with Eagle for the purpose of protecting Eagle's aeronautical business interests on the Airport.
5. The Respondents' Airport Manager created a designated self-refueling area for use by all Airport users that desired to self-refuel on the Airport.
6. The Respondents interpreted its Rules and Standards as applied to the Complainant in an ambiguous and capricious manner.
7. The Respondents issued Cedar Crest Enterprises verbal permission to self-refuel their individually owned aircraft outside of the designated self-refueling area and Eagle self-refueled its individually owned aircraft without written permission outside of the designated self-refueling area. The Respondents refused to issue the Complainant either verbal or written permission to self-fuel his individually owned aircraft outside of the designated self-fueling area.
8. Mr. Ron Gilbert, the Respondent's Airport Manager, testified in an Indiana State Court deposition that commercial operators have the exclusive right to self-fuel outside of the designated self-refueling area on the Airport.

9. The Respondents enforced its Rules and Regulations against the Complainant in an unjust and discriminatory manner.
10. The Respondents failed to provide a compelling reason in order to justify its unjust and discriminatory enforcement action against the Complainant.
11. The enforcement of the statute of limitations against the Respondents for failing to file documents in the proceeding in a timely manner. [FAA Exhibit 1, Item 2]

ANALYSIS

In reviewing the eleven (11) allegations above, it has been determined that they can be grouped for analysis into three sections: 1. Race discrimination, 2. Exclusive Rights, and 3. Failure to file timely responses to Complaint.

Race Discrimination (discusses items 1, 2, 7)

The Complainant argues that the FAA erred because it did not consider his race in its March 30 Director's Determination. Mr. Turner states in his appeal that "the FAA has jurisdiction to consider the suspect classification of the Complainant in this proceeding. The Director denied the Complainant due process of law by failing to consider the suspect classification of the Complainant and by failing to apply strict scrutiny in making the Determination." Additionally, Mr. Turner argues that the Director erred in finding "...that Cedar Crest was a fixed base operator, which is a commercial aeronautical activity. Neither the pleadings submitted by the Complainant nor the pleadings submitted by the Respondents support this conclusion." Mr. Turner also argues that the City provided verbal permission to Cedar Crest Enterprises to self-fuel their individually owned aircraft outside the designated self-fueling area and refused to provide the same right to Mr. Turner. [FAA Exhibit 1, Item 2, page 1-2]

As indicated in the Director's Determination, the allegation of discrimination has been referred to the FAA's Office of Civil Rights for review and appropriate action pursuant to Title VI of the Civil Rights Act of 1964 and the United States Department of Transportation's (DOT) implementing regulation, 49 CFR Part 21. The purpose of Part 21 is to effectuate the provisions of Title VI to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation. Because the Complainant's Title VI allegation is being handled under Part 21, footnote 3 on page 16 of the Determination noted that this allegation was dismissed without prejudice "and may not be appealed to the Associate Administrator for Airports." [FAA Exhibit 1, Item 1, page 1] Mr. Turner will be contacted by a representative of the FAA's Office of Civil Rights within the next 30 days.

There is a distinction between economic discrimination and race discrimination. The Director's Determination addressed economic discrimination. As indicated, the Complainant's race discrimination allegations are under review by the FAA's Office of Civil Rights. Mr. Turner discusses sponsor assurance 22(a) in his appeal in relation to race discrimination. However, assurance 22(a) addresses economic discrimination rather than race-based discrimination.

As discussed in the Director's Determination, the City has averred and FAA investigation has supported the fact that Cedar Crest is not currently an airport tenant, nor has it been since 1997. It is not within the scope of FAA's jurisdiction to redress past perceived wrongs done by a Federally funded airport, rather, determinations of compliance or non-compliance are based on current-day practices. In addition, as noted in the Determination, the Cedar Crest issue predated the Minimum Standards that are in question. This fact renders the Cedar Crest situation irrelevant to questions concerning whether current City practices on the airport are consistent with the City's Minimum Standards, and Federal law and policy.

Thus, the decision to not have considered the Cedar Crest situation in making the determination was appropriate. [FAA Exhibit 1, Item 1, page 11-footnote 2] FAA finds that Mr. Turner's appeal does not provide any additional information that could be used to establish a relationship between Cedar Crest and the City of Kokomo that would need further analysis. Therefore, this allegation is dismissed.

Exclusive Rights (discusses items 3, 4, 5, 7, 8, 9, 10)

Issue 3(a) raised by Mr. Turner again alleges violations of the Sherman Act. No new information has been provided. As indicated in the Director's Determination, the FAA does not have the authority to determine whether or not the City has violated the Sherman Act. Mr. Turner may pursue this allegation with the United States Department of Justice.

Issue 3(b) again alleges violations of the Article 1, Section 8, of the United States Constitution (Commerce Clause). No new information has been provided. As indicated in the Director's Determination, the FAA does not have the authority to determine whether or not the City has violated the Commerce Clause. Mr. Turner may pursue this allegation with the United States Department of Transportation, Office of the General Counsel, or the United States Department of Justice.

Issues 3(c), 5, 7, and 9 all raise again the allegation of discriminatory treatment (economic) against Mr. Turner by the City over the proper location on the airport for self-fueling operations. As discussed at length in the Director's Determination, the record established that Flying Eagle Aviation and Mr. Turner are subject to *different* minimum standards for self-fueling. FAA policy clearly states that airport sponsors have the right to distinguish between different classes of aeronautical users. The grant assurances provide for the airport sponsor's right to establish reasonable classes of commercial aeronautical users under different rules, regulations, and minimum standards. (See Assurances 22(c)(e)). Although not explicitly mentioned, the right to distinguish

between commercial and private aeronautical users is a necessary corollary of the right to distinguish among classes of commercial aeronautical users. One such example would be FBOs who have bargained for and entered into a lease arrangement with the sponsor, and private operators, who would not have such a business relationship. In fact, FAA policy even permits airport sponsors to distinguish between types of FBOs in setting rates or in any other reasonable manner. Thus, if one FBO is a full-service operator and another FBO is conducting only flight training or aircraft sales, then the sponsor may apply dissimilar requirements to such operators. FAA Order 5190.6A, paragraph 4-14(d)(2)(c).

Mr. Turner is a private aircraft owner who desires to self-fuel his own aircraft. Mr. Turner acknowledges that status on the airport on page five of his appeal. The Minimum Standards and Rules and Regulations, Paragraph K, requires that all airport users "not operating under a lease contract with the airport to conduct refueling operations, shall refuel only in areas designated by the Board for that purpose." [FAA Exhibit 1, Item 3, Minimum Standards, page 25] Mr. Turner and any other person piloting an aircraft on the airport is clearly an airport-user and aviation-user of the airport and would be subject to this requirement.

As fully analyzed in the Director's Determination, Mr. Turner's self-fueling activities are addressed under paragraph K of the Minimum Standards. Mr. Turner is not a commercial aeronautical activity and therefore would not be controlled under paragraph J, which identifies commercial aeronautical activities. [FAA Exhibit 1, Item 1, pages 9-11] In spite of Mr. Turner's apparent misunderstanding, he is being held to the appropriate clause of the Minimum Standards as is applicable to self-fueling activity.

Any additional cost that Mr. Turner may bear in taxiing his aircraft to the designated self-fueling area is borne equally by all members of his class of airport user. It is not the case that other members of the class of private aircraft operators that includes Mr. Turner have self-fueling privileges that Mr. Turner does not have.

Concerning Issue 4, Mr. Turner states in his Appeal that "The Contract between the Respondents and Eagle explicitly states in pertinent part that Lessor (Respondents) does covenant and agree that 1: it shall enforce the Minimum Airport Operating Standards and Requirements, including standards of financial responsibility, established by the Board for all aeronautical endeavors and activities conducted at the Airport. 3: It will not permit the conduct of any aeronautical endeavor or activity at the Airport, except under an approved lease or operating agreement. The Contract was signed by both the Respondents and Eagle on September 27, 1993. The minutes of the Respondents Board Meeting held on April 10, 1995, explicitly states that "An airport owner can most closely approach complete objectivity by developing and publishing minimum standards before negotiating with any specific tenants." Mr. Turner goes on to conclude that "the Contract predates the creation and adoption of the Respondents' Standards and calls for the enforcement of Minimum Standards that had not been adopted by the Respondents. Therefore, Respondents' Standards were created to protect the aeronautical business interests of Eagle."

In the Director's Determination, it was determined that the City of Kokomo adopted the Minimum Standards and Rules and Regulations on June 1, 1995. The City explained, prior to the adoption of the Minimum Standards, even though some rules and regulations did exist, certain practices made the control of the airport difficult and the Minimum Standards and Rules and Regulations were warranted. The Board of Aviation Commissioners followed Airport Compliance Requirements, FAA Order 5010.6A, dated October 2, 1989, in the preparation of the minimum standards. [Exhibit 1, DD, exhibit 1, Item 8]

It is also stated in the Director's Determination and supported by the administrative record that the City of Kokomo issued two citations to Mr. Turner because he self-fueled his individually-owned aircraft in violation of the applicable Minimum Standards.

Additionally, on December 2, 1996, the City of Kokomo Corporation Counsel, Mr. Kenneth J. Ferris, filed a suit for collection of a \$300 fine against Mr. Turner in Howard Superior III Court, Indiana, for a civil penalty for non-compliance with the Airport's Minimum Standards and Regulations. [FAA Exhibit 1, DD, exhibit 1, Item 1, exhibit C]

It is unclear to the FAA what Mr. Turner is trying to conclude in this item of his appeal. If airport minimum standards are reasonable and applied in a non-discriminatory manner, it does not matter that a business or businesses were tenants on the airport prior to the development and issuance of the minimum standards.

It appears that by again making this allegation on appeal, Mr. Turner is attempting to equate the requirements of the Minimum Standards as they apply to a commercial aeronautical activity, in this case to Flying Eagle Aviation, to his own desires as an airport user to self-fuel his aircraft in close proximity to his leased hangar, rather than in the designated self-fueling area.

Mr. Turner does not provide additional information on appeal that persuades the FAA that because the contract with Flying Eagle Aviation, Inc., was signed prior to the issuance of the minimum standards, that there was any intent on the part of the City to grant an exclusive right to Flying Eagle.

In Issue 5 of his appeal, Mr. Turner quotes from an Airport policy letter that stated "On June 1, 1995, the Airport will enforce the parking and self-fueling procedures for the safety of everyone. Any person, group or corporation in violation of the newly adopted Rules, Regulations, and Minimum Standards will be subject to a fine...." Mr. Turner goes on to state that "At the same time, the Respondents violated the policy letter by not bringing enforcement action against Eagle. The Respondents allowed Eagle to continue to both self-fuel its aircraft and refuel its customers aircraft on the ramp area near the terminal building and near hangars on the public taxi-ways in violation of the June 1st, letter...."

As discussed previously in Issue 3, the grant assurances provide for the airport sponsor's right to establish reasonable classes of commercial aeronautical users under different rules, regulations, and minimum standards. (See Assurances 22(c)(e)). Although not explicitly mentioned, the right to distinguish between commercial and private aeronautical users is a necessary corollary of the right to distinguish among classes of commercial aeronautical users. Thus, the fact that Flying Eagle is a commercial aeronautical business providing services for compensation or hire, and Mr. Turner is a private operator leasing hangar space justifies the reasonable difference in the minimum standards.

In Issue 6 of his Appeal, Mr. Turner states that "The Respondents classified Mr. Turner as an aeronautical or aviation activity in its Indiana State cause of action; this is a gross misinterpretation of the Respondents' Rules and Standards. Mr. Turner is only a private operator of suspect classification; Mr. Turner has not engaged in any aviation or aeronautical activity as defined in the Rules and Standards." [FAA Exhibit 1, item 2, page 5/6]

Mr. Turner further states that "Section 3(A)3 of the Respondents' Rules state: Aviation Activity: No person shall engage in any aviation or aeronautical activity on the Airport without compliance with all Airport Minimum Standards and first receiving written permission from the BOAC,' The words "aviation and aeronautical" are synonymous. Title 49, United States Code, section 40102, defines "aeronautics as the science and art of flight. Since Mr. Turner has not performed any aeronautical activities on the Airport, this Rule, as written does not apply to Mr. Turner." [FAA Exhibit 1, Item 2, page 6]

The airport rules and regulations do apply to Mr. Turner. The fact that he is an aircraft operator, basing his aircraft in a hangar leased by the City of Kokomo, make him subject to the rules and regulations. The terms "aviation" "and aeronautical" are generally understood to pertain to airport users. In some cases, certain aspects of the rules will pertain only to commercial operators who provide a service for hire or compensation. Other requirements apply generally to all airport tenants and users. In this case, Mr. Turner would need to comply with all of the rules and regulations except those required of a commercial operator providing services for hire or compensation.

Mr. Turner also disputes language under Fueling Operations that states "The following requirements pertain to all airport users desiring to Self-Fuel their individually owned Aircraft with Aviation Fuel or Automotive gasoline (mogas) in their aircraft."

Mr. Turner states that the term all airport users," as written, refers to all airport users that provide a commercial aeronautical activity on the Airport. However, even if Paragraph K is taken out of context with the remainder of Section III, as stated in the first paragraph on page 13 of the Determination, then the only other reasonable interpretation of the term "all airport users" must include both Eagle and Complainant regardless of classification. Therefore, the conclusion made in the Analysis Section, page 10 of the Determination that "It is apparent that Paragraph J governs commercial operations and Paragraph K is applicable to self-fueling operations by private aircraft owners," is a perfunctive [sic] and

conclusive adjudication of the written record. The adjudication approves of the illegal enforcement actions of the Respondents."

FAA is not persuaded that Mr. Turner makes a valid, substantive argument regarding the various interpretations of specific terms. Mr. Turner, as a bona-fide tenant of the airport, under lease with the City for an aircraft hangar, is subject to the airport minimum standards that pertain to his activities on the airport. The fact that he argues that certain language, interpreted a certain way, would exclude him from being subject to the minimum standards is not supported by fact. Mr. Turner has provided no new evidence of material fact that would lead the FAA to conclude that he is exempt from the airport minimum standards and airport rules and regulations as they pertain to self-fueling.

In Issue 7 of his appeal, Mr. Turner alleges that Cedar Crest was granted verbal permission to self-fuel and Eagle failed to obtain written permission to self-fuel. As discussed previously, FAA cannot consider Cedar Crest in this complaint because Cedar Crest has not been a tenant on the airport since 1997. Cedar Crest's tenancy at the airport ended prior to the time the original complaint was filed with the FAA.

Mr. Turner also raises the allegation in Issue 7 that "The fact that Eagle is classified as a commercial aeronautical activity does not mean that Eagle can use the Airport in a similar manner as Complainant as a private operator of suspect classification and not suffer the same consequences as Complainant." Mr. Turner's allegation states in the Minimum Standards adopted by the Airport that "Airport users not operating under a lease contract with the Airport to conduct refueling operations shall refuel only in areas designated by the Board for that purpose." [FAA Exhibit 1 Item 3, Minimum Standards, Section 111, page 25/26]

Mr. Turner does not have a lease contract with the airport to provide refueling operations, rather, Mr. Turner, as a airport user not under a commercial lease contract with the Airport, is required to use the designated self-fueling area. This is a reasonable requirement. For a further discussion of this argument, see Issue 8 below.

In Issue 8 of his Appeal, Mr. Turner again alleges that different treatment between differing classes of airport users somehow is discriminatory and amounts to the granting of an exclusive right. Again, his argument has no merit. As discussed at length in the Director's Determination and elsewhere in this Record of Decision, FAA law and policy permit airport sponsors to distinguish among classes of commercial aeronautical users. Examples of different classes include air carrier, general FBO, limited FBO, and private operator. It is entirely within an airport sponsor's discretion to distinguish between various classes of airport users in setting rates or allocating space. However, any such differentiation must be reasonable, equitable, have a rational basis, and not be *unjustly* discriminatory. Differing treatment among airport users does not necessarily constitute unjust discrimination nor does it necessarily amount to the granting of an exclusive right.

In Issue 11 of his Appeal, Mr. Turner again alleges that the City failed on two separate occasions to either provide documents to all parties or file pleadings within the time limits permitted by regulation. Mr. Turner further states that "The failure of the Director to provide a favorable ruling to Complainant on clear violations of the regulations governing the conduct of this proceeding clearly indicates unfair bias by the Director in favor of the Respondent." [FAA Exhibit 1, Item 2, page 11] However, Mr. Turner raises no new arguments or provided additional information on appeal that are persuasive to the FAA that the delay in receiving documents or the lateness of a response to a Motion was prejudicial to the complaint.

As discussed in the Director's Determination, on February 22, 1999, Mr. Turner filed an Objection to Respondent's Answer to Motion. Mr. Turner argues that the Respondent's answer to the motion was filed after the ten day period in violation of 14 CFR Part 16.17(c), which generally requires that answers to motions must be filed within ten days after the motion has been served on the party. Although the answer to the motion was filed after the ten days, the late document did not, in any manner, prejudice Mr. Turner's case. Mr. Turner has never demonstrated how he was prejudiced or harmed by the late filing (about eight days) of the Respondent's Motion. [FAA Exhibit 1, Item 1, page 15]

Also stated in the Director's Determination, "On November 20, 1998, Complainant filed an objection stating that the respondents failed to provide " a complete set of documents in the Answer, specifically, a copy of the Minimum Standards and Rules and Regulations referred to in paragraphs 3 and 4 of the respondent's Answer. We note that Complainant did not provide the FAA a copy of those documents as required under 14 CFR 16.23(b)(2) to support his allegations. The FAA requested the City to send the documents to all parties on December 14, 1998, and the FAA specifically requested that a complete set of requested documents be provided to Complainant on March 29, 1999. While it is not clear exactly what documents Complainant had in his possession at the time the complaint was filed, it is clear from the complaint itself that Complainant had sufficient knowledge of the Minimum Standards and Rules and Regulations to support his complaint. Accordingly, we do not find that the City's alleged failure to provide any documents prejudiced Complainant's case...." [FAA Exhibit 1, Item 1, page 14]

Again, the FAA has not been made aware of any harm that would have occurred in this process as a result of some documents being filed late, or needing to be re-sent to a party. The outcome of the Director's Determination was not affected by the lateness of certain documents.

CONCLUSION

Mr. Turner's appeal does not provide any basis for reversing the Director's Determination that the City of Kokomo did not violate its Federal obligations under 49 U.S.C. 40103(e), and 47107(a)(1)(4), or grant assurances numbers 22 and 23. Mr. Turner raises no new issues on appeal, nor does he provide any evidence that the Director's Determination failed to fairly state and define the reasons for the dismissal of the Complaint.

Therefore, this Appeal is dismissed pursuant to 14 CFR 16.33. For the exclusive rights and economic nondiscrimination issues only, this Decision constitutes the final decision of the Associate Administrator for Airports, pursuant to 14 CFR 16.33(a) under the authority of 49 U.S.C. Section 47107 and 47122, and federal grant assurances No. 22 and 23 on economic non-discrimination and exclusive rights.

However, since the Title VI allegation is being handled under a separate administrative process, 49 CFR Part 21, this Decision constitutes neither final agency action nor a final decision on this allegation. As a result, the Title VI allegation is not subject to judicial review at this time. As indicated above, Mr. Turner will be contacted within the next 30 days by a representative of the FAA's Office of Civil Rights pursuant to 49 CFR Part 21.

APPEAL RIGHTS

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia 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 the order is issued.



Louise E. Maillett
Acting Associate Administrator
for Airports

Date: July 27, 1999