Facing the FAA in Court (or, Whoever Has the Gold Makes the Rules)

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The federal government makes the rules when it comes to bringing suit against United States agencies. Unsurprisingly, those rules are designed to make suing the federal government very difficult. There are only certain circumstances under which one can hale a federal agency into court, and, even then, there are stringent jurisdictional requirements and a very narrow window for filing. In short, lawsuits against federal agencies in general—and the FAA in particular—are fraught with procedural perils. A number of recent court decisions have spotlighted the more common banana peels upon which plaintiffs slip.

The first case, *Martin v. United States*, involved an apparent long-running feud between a commercial pilot and the FAA principal operations inspector assigned to his employer. The repeated clashes between the two ultimately resulted in the inspector placing a negative letter into the pilot's file and making critical comments to the pilot's manager. The pilot filed a libel claim with the FAA, which was denied, and then sued the FAA for denial of due process and negligence. The federal government has not consented to being sued for libel, so the court quickly dismissed the pilot's claim stemming from the inspector's comments. The federal government has consented to being sued for abuse of process, but only when that abuse arises from acts of law enforcement officers; thus, the viability of the pilot's abuse of process claim turned on whether the FAA inspector was a "law enforcement officer." The court concluded that, while inspectors can execute searches and seize evidence to enforce FAA regulations, they cannot execute searches or seize evidence "for violations of federal law." Thus, according to the court, the inspector was not a law enforcement officer, and the FAA could not be sued for his actions. The court did not discuss how it is that federal aviation regulations do not qualify as "federal law."

In the next case, *BRRAM, Inc. v. FAA*, a citizens' group formed to oppose Trenton-Mercer Airport's expansion plans challenged the FAA's decision to permit Frontier Airlines to provide commercial passenger service at the airport. Unfortunately for the group, only federal appellate courts have jurisdiction to review FAA orders, and the citizens' group filed its petition in the district court. Thus, the Third Circuit affirmed the district court's dismissal of the petition.

The Tulsa Airports Improvement Trust suffered a similar result in its attempt to

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obtain reimbursement from the FAA under a grant program. On October 24, 2012, the FAA sent a letter to the airport stating its determination that the costs claimed were not reimbursable under the grant program and saying that "additional reviews on the grants would not be considered an efficient use of resources." The airport appealed the FAA's decision to an associate administrator, who denied the appeal on December 31, 2012, but invited the airport to submit additional information. Eleven months later, the airport filed a breach of contract claim in the Court of Federal Claims. That court, though, had no jurisdiction to hear the breach of contract claim; the Court of Federal Claims only reviews decisions to withhold grant money that is *due*, and the payments at issue here were not due, as they were determined not to be reimbursable at all. Thus, only the Federal Court of Appeals had jurisdiction to hear the airport's claim, and the Federal Court of Appeals concluded that the airport filed too late. A petition seeking review of an FAA final order must be filed within 60 days of the order, so the airport was eight months late. The Tenth Circuit noted that it could excuse the late filing for good cause, but the ambiguity created by the FAA's invitation to submit more information did not suffice. As a word of warning, the court stated: "Parties should assume finality in the face of ambiguity and file protectively for judicial review."

Finally, in *Padilla v. Administrator*, the Eleventh Circuit affirmed the dismissal of a petition brought by two FAA-designated training center evaluators who complained that the FAA's notice of termination of their designations was too vague. The FAA Order that deals with terminating a designee requires that the termination be in writing, and that "the reasons cited will be as specific as possible." The Order also contains a very general template termination letter. The termination letter the petitioners received was nearly identical to the vague template, adding only that the plaintiffs had certified an airman who did not meet the English language requirements. The letter not did inform the plaintiffs who this airman was, when the violation occurred, or any other information that would help them mount a defense. Nevertheless, the Eleventh Circuit dismissed the petition, holding that by using the template contained in its Order, the FAA necessarily complied with the Order. The court acknowledged the inherent tension in finding that a generic template letter is "as specific as possible," but concluded that any other standard would be unworkable.

Though these cases might suggest otherwise, it is possible to successfully challenge an FAA order in court. Doing so, though, requires a deep familiarity with the obscure rules governing challenges as well as strict compliance with those rules.