

March 6, 2002

Docket Management System
U.S. Department of Transportation
Room Plaza 401
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: Docket No. FAA-2001-10999

To whom it may concern:

On behalf of over 21,500 pilots employed by Airborne Express, American Airlines, Southwest Airlines, TransAir, and United Parcel Service, the Coalition of Airline Pilots Associations (CAPA) respectfully submits this comment to the new rule on Criminal History Records Checks (CHRC) and urges the FAA to incorporate due process provisions into that rule.

CAPA is certainly sympathetic to the need for stricter security for our nation's airports in the wake of September 11, 2001 and does not oppose the imposition of the rule on all new applicants after the effective date. However, we have serious concerns about the retroactive effect of this rule.

As you know, the rule imposes an across-the-board requirement not only on applicants but on all individuals who currently have unescorted access authority that they submit to a fingerprinting and criminal background check. The discovery of a conviction for a listed criminal offense results in an automatic disqualification for access to all Security Identification Display Areas (SIDA). As the FAA has acknowledged in the rule's accompanying Q&A, "[i]n practice, such individuals generally will either not be hired or will be discharged." To apply this rule to pilots who have already flown for years without incident is both counterintuitive and counterproductive. We believe it is unlawful as well.

Airline pilots cannot perform their duties without access to the secured area of airports. The FAA has effectively ordered some pilots to be discharged just as surely as if the FAA had revoked their licenses. The FAA used a regulation with similar wording when it required alcohol testing of pilots and others some years ago. A petition for review challenged that regulation. While the court allowed the regulation to stand, it made it absolutely clear that those covered by the regulation were indeed entitled to due process prior to discharge. Cronin v. FAA, 73 F. 3d. 1126. Now the FAA has issued another regulation that will surely cause some established employees to be discharged and has made no provision for notice and hearing. Even though the regulations require the employers to disqualify the employees, it is the government that is the actor. The FAA may not avoid due process simply by ordering the employer to discharge an employee rather than acting directly. Unemployed persons will be forced to initiate expensive court actions because of the FAA's failure to address this obvious problem. Some with meritorious claims will never due this for simple lack of money. This aspect of the regulation

appears to be willfully arbitrary.

CAPA opposes application of this rule to currently-employed pilots on the basis of the search itself and the effects of the search. First, requiring such exhaustive searches at this extremely late date exposes the airline companies and airport operators to an unnecessary administrative burden at a time when the industry is at its most vulnerable economically. The expense seems unjustifiable given that every pilot hired since 1996 already has been subjected to an employment history investigation. Of those, several also have undergone CHRCs. All pilots, whether hired before or after 1996, are required to report any new convictions on a regular basis in their medical applications to the FAA. Thus, the current rules already provide for ways to ascertain whether a pilot poses a security threat. Adding another search to the ones that previously have occurred will contribute much to the industry's financial woes while contributing little or nothing to our nation's efforts to root out terrorism.

We object to the agency's decision to make this regulation effective without a prior notice and comment period. Allegedly this was necessary because of what the agency learned about these matters in the wake of 9/11. In fact, the agency knew or should have known about the facts cited years ago as they all were pointed out to the agency repeatedly, both by those in the industry and by Congress. In any case, the agency elected to bypass the normal notice and comment process months after the events of 9/11. No showing has been made that the time required to complete the normal process would harm the public. The agency gives the airports and operators a full year to achieve compliance, but declines to take the time to gather and analyze comments prior to issuing a final regulation. If there are valid reasons for haste, then why didn't the agency act long ago? What changed in December 2001?

More importantly, the new measure constitutes a per se rule that lacks any due process safeguards. As mentioned above, the consequence of a search revealing a conviction for a listed offense is automatic disqualification from access to any SIDA. A pilot without SIDA access is a pilot without access to a plane. Clearly, as the government has acknowledged, any pilot in this situation will lose his job. Yet not every disqualifying offense automatically correlates to an actual security threat. For instance, one of the statutory offenses is aggravated assault. Under this rule, a pilot who got in a barroom fight ten years ago could now be in danger of losing a job he performs perfectly well.

We believe that the regulation is arbitrary in that it makes no distinction among the listed convictions as to relevance and gravity. A prior conviction for "air piracy" is viewed in the same light as a conviction for lesser offenses. The ten-year time limit is arbitrary as well in that it applies to all listed convictions. Some of the convictions should probably bar access permanently no matter how far in the past, while others might be acceptable after a shorter period of lawful behavior.

The regulation states that the listed offenses are disqualifying if there was a conviction for one of them either within ten years of application for access or while the individual has access. Does this mean that a current employee who has had access for 15 years must be discharged for a conviction 12 years ago? Please clarify this. Is a person who applies for access and who has a

conviction 9 years ago permanently disqualified, or only until ten years have elapsed? How about current employees with 9-year-old convictions? Are they permanently disqualified or only until the conviction is ten years old?

The wording of the regulation is not sufficiently precise. It appears that the only reasons for disqualification are either conviction of a listed offense, or a finding by a court of not guilty by reason of insanity. At various places in the regulation confusing terminology such as “an arrest leading to an offense” and “having an offense” are used. Hopefully it is offenses that lead to arrests and conviction. Offenses are committed and not “had.” Most importantly it is neither arrests nor offenses that disqualify, but only convictions. Since many non-lawyers will administer this regulation, the fact that it is only convictions that matter must be made absolutely clear every time offenses and arrests are mentioned.

The FAA does not make it clear that only felony convictions are relevant even though that seems reasonable. Whatever is intended must be stated unambiguously. Some convictions are listed without any indication that they must be felony convictions. Number 20, Unlawful use possession, sale or manufacture of an explosive or weapon could be something as minor as a fireworks offense or failure to properly register a gun. Without a clear statement that it is only felony convictions that are relevant, those who administer the regulation are not given adequate standards.

We do not agree with the record keeping provisions of the regulation. There is no need for any local record except that the individual has been subject to the checks and has passed. The FAA may resolve any suspicion of the employer on this score by repeating the check on selected individuals. A file showing that a person has been checked and has passed contains no relevant information except that. The record of an individual who has been found to have a conviction of one of the listed offenses is disqualified and in the case of a pilot, discharged. Why would his former employer keep that record? Any subsequent application for employment would require a new check anyway. The only required record is that employees with access have been checked and have passed. The details of the records of passing employees contain no relevant information. The source of all relevant information about convictions is only the FBI and the courts. Local records serve no useful purpose and create invitations for privacy invasions and other mischief.

At the very least, the rule should allow for a grandfather clause that provides current pilots with the opportunity to show that they do not pose a security threat despite having a conviction for one of the listed offenses within the last ten years. If a conviction is known or discovered, the employing airline company should be able to review the circumstances surrounding the conviction, the pilot’s performance history, and any other relevant factors. If the company finds that the pilot poses no threat despite the conviction, it could then certify its findings to the FAA, much in the same way the regulations allow an airport operator, under 14 CFR 107.209(n), to accept an aircraft carrier’s certification that an employee meets the criteria for unescorted access authority. The employing company is the appropriate entity to make this determination, for it is in the best position to assess whether a pilot satisfies all the requirements of the job. Furthermore, the airlines spend an enormous amount of time and resources training pilots. They have every incentive to ensure that their pilots are trustworthy and stable. These procedures would ensure, at

a minimum, that this retroactive rule is applied in a fair manner.

CAPA appreciates the extended opportunity to comment on the proposed rule and respectfully requests that the above comments be incorporated into future amendments.

Sincerely,

Captain Robert Miller
President