Docket Management System
U.S. Department of Transportation
Room Plaza 401
400 Seventh Street, SW
Washington, DC 20590

RE: CALL FOR COMMENTS; FAA-2001-10999

Feb. 21, 2002

To Whom It May Concern:

Thank you for the opportunity to comment on the FAA's final rule regarding Criminal History Record Checks (66 Fed. Reg. 63474). This letter discusses three potential problems with the Rule as currently drafted.

In promulgating the Rule, the Federal Aviation Administration's position is legally sound. The FAA is vested with the authority to make rules relating to air travel. 49 USC § 106(f)(3)(a). According to Congress, the primary focus of this authority should be insuring the safety of airport personnel and air travelers in the United States. 49 USC § 40101(a)(1). Consistent with this purpose, 49 U.S.C. § 44936 empowers the FAA to issue regulations requiring security checks for certain employees. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century further extends the FAA's authority to conduct security checks whenever the Administrator "decides it is necessary to ensure air transportation security." 49 U.S.C. 44936(a)(1)(C)(v). Additionally, the FAA's authority to conduct CHRCs was specifically extended by § 2 of the Airport Security Improvement Act of 2000. ASIA 2000 also expanded the list of triggering crimes warranting removal from positions involving unrestricted SIDA access. Finally, the Rule as proposed would fulfill the requirements of § 138 of the Aviation

Transportation Security Act, which requires all individuals with unrestricted SIDA access to undergo criminal background checks.

Requiring criminal history record checks is consistent with the purpose of the FAA. As the Rule suggests, there is a need for heightened security where unrestricted access is available. Nevertheless, despite the apparent legality of the administrative action proposed, there may be policy concerns against implementing the Rule as currently drafted.

Although the desire to protect the public in the wake of the September 11th attacks is strong, this desire must be balanced against basic principles of fairness. The FAA should not act in such a way that would lead to the wrongful discharge of airport employees. Further, any regulation adopted by the FAA should not impose an egregious administrative burden on airports. Finally, the security measures implemented by the FAA should be narrowly tailored to directly counteract the threat of terrorism, and should not be based on conjecture.

Lack of Appeal Process

As the FAA recognizes, employees who occupied positions prior to January 31, 1996, have not undergone CHRCs. The FAA further recognizes that more applicants will be disqualified under the new screening mechanisms; additionally, some employees who previously passed the FAA's requirements for employment screening will now be terminated because their criminal history includes an offense listed in the newly expanded ASIA 2000. The legislative history of ASIA 2000 indicates that Congress

believed the number of people removed from their jobs would be low; however, this does not justify the action.

The FAA's Rule makes no provisions for appealing the decision to restrict SIDA access to employees whose criminal histories conflict with its new requirements. Because the rule will mandate CHRCs for all current airport employees, this will result in the termination of long-term airline workers. To discharge such employees without an opportunity for redress violates basic principles of fairness, and may place the FAA on dangerous legal footing.

The FAA should amend the Rule to allow for an appeals process for airport workers whose security clearance has been restricted. At the very least, such workers should be entitled to a hearing to determine whether their criminal histories warrant removal from their current positions.

Administrative Difficulties

The Rule also raises questions of administrative efficiency. The difficulty in implementing the proposed changes will weigh heavily on smaller airports. However, even those airports with greater financial resources will be burdened. What the FAA proposes may be tantamount to an administrative nightmare; by December 6, 2002, the FAA requires that every airport begin submitting fingerprint information. This process will be both expensive and time consuming.

The FAA should extend the deadline given in the Rule, and should offer less-expensive alternatives to smaller airports.

Effectiveness of the Rule

This Rule is but one example of our country's effort to tighten security at home in order to defeat a foreign threat. Although the nation remains horrified by recent events, it should be remembered that the terrorist attacks of September 11th were not the result of terrorists infiltrating or influencing airport personnel. While requiring background checks for safety-sensitive employees may be reasonable, it is not necessarily tailored to prevent future attacks.

The FAA suggests that terrorist organizations may consider the use of airport personnel to further their interests; however, this conclusion is based on little more than conjecture. Without any evidence pointing to a threat within existing airport personnel, this violation of constitutionally protected privacy rights may be considered unjustified.

The FAA should carefully consider the consequences of such a broad inquiry into the criminal histories of its employees. At the very least, the FAA should promulgate more specific rules to insure that all information secured through CHRCs is kept confidential, and that the privacy rights of airport employees are protected.

Although there are no legal barriers to implementing this rule, policy concerns weigh heavily against some particular aspects of the action. The FAA should not act until it has weighed the need to protect the public against the competing interests of fairness, efficiency, and personal privacy.

Thank you for the opportunity to comment on this matter.

Sincerely,
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