



United States Department of Transportation
TRANSPORTATION SECURITY ADMINISTRATION

400 Seventh Street, S.W.
Washington D.C. 20590

APR 25 2003

Mr. Andy Cebula
Senior Vice President
Government and Technical Affairs
Aircraft Operators and Pilots Association
421 Aviation Way
Frederick, MD 21701-4798

Dear Mr. Cebula:

I would like update you as to where we stand since our meeting on February 6th regarding concerns that members of the aviation community have raised about the Transportation Security Administration's (TSA) regulations governing security threat determinations for individuals who hold airman certificates issued by the Federal Aviation Administration's (FAA).

As you know, at that meeting I explained the context in which TSA adopted its regulations. Prior to September 11, 2001, the use of background checks to uncover security concerns was not part of the FAA's airman certification process. The General Accounting Office recently issued a report that confirmed the need for additional security measures in issuing airman certificates.

In addition, TSA learned last year that individuals who were listed on a "No Fly" list created from submissions of information by federal law enforcement and intelligence agencies held airman certificates. This revelation highlighted the need for TSA to act as quickly as possible to issue regulations that would allow the agency, consistent with its statutory duty, to inform FAA that an individual holding an airman certificate posed a potential threat to aviation security. Under the Aviation and Transportation Security Act (ATSA), TSA is required to establish procedures to notify the FAA Administrator of the identity of individuals known to pose, or suspected of posing, a threat to civil aviation or national security.¹ In accordance with the ATSA, TSA's regulations were reviewed by the Transportation Security Oversight Board.² In addition, the Department of Justice was deeply involved in the drafting of the regulations.

The authority to issue and revoke airman certificates rests with FAA. TSA's role is to notify the FAA Administrator of the identity of individuals known to pose, or suspected

¹ See 49 U.S.C. 114(h)(2).

² The TSOB now is within the Department of Homeland Security and is composed of the following officials or their designees: the Secretary of Homeland Security; the Secretary of Transportation; the Attorney General; the Secretary of Defense; the Secretary of the Treasury; the Director of the Central Intelligence Agency; and a representative of the National Security Council. See 49 U.S.C. § 115(a), (b)(1)(as amended by Pub. L. No. 107-296, § 426, 116 Stat. 23136 (Nov. 25, 2002)).

of posing, a threat to civil aviation or national security. TSA is not initiating any independent investigations of certificate holders' activities and affiliations and has no plans to engage in such reviews. Rather, TSA's actions to date have been predicated on threat information, including classified intelligence information, obtained from other federal agencies.

TSA adopted the procedures in its regulations to target the relatively small group of individuals identified as potential threats to the security of civil aviation or to national security. The results of TSA's application of its regulations to date demonstrate the very limited effect of TSA's efforts on the vast majority of individuals holding airman certificates. Based on TSA's review to date of 1.2 million certificate holders, TSA has determined that only eight individuals, all of whom are non-resident aliens, pose a security threat.

Of the eight individuals that TSA has determined to pose a security threat, three have chosen to challenge TSA's determination. These three individuals have been issued an Initial Notification of Threat Assessment and the FAA has issued emergency orders suspending their airman certificates pending a final determination by TSA. Two of these individuals appealed the emergency suspension orders to the National Transportation Safety Board (NTSB), which denied the appeals. In denying the appeals, the NTSB held that it was without authority to review TSA's security threat determinations that served as the basis for the FAA's emergency suspension orders.


Some members of the aviation community have raised a concern that a certificate holder's avenue of administrative appeal of TSA's security threat determination is entirely within TSA. In addition, some have noted that an individual whose certificate is revoked may have access to only limited information related to TSA's security threat determination because of the classified nature of the information.

We are aware of the need for an avenue of administrative appeal outside of TSA. Accordingly, TSA is exploring the possibility of providing for a final appeal review level at the Department of Homeland Security, taking into account the special considerations involved where agency determinations are based on classified intelligence information. When an agency determination is based on classified intelligence information and the judgment to be made is one that is predictive in nature, we believe that national security concerns warrant leaving the matter to the expertise and discretion of the agency charged with making the determination. Moreover, in these situations TSA faces a conundrum. Classified intelligence information may indicate that an individual poses a threat to aviation security, but such information cannot be shared with that individual without endangering national security. That said, we have taken steps to put a process in place that ensures TSA does not make determinations in an arbitrary and capricious manner, and providing an additional level of administrative review outside of TSA will only bolster this process.

In closing, TSA is committed to ensuring the security of all aspects of the civil aviation system in a fair and effective manner. In doing so, TSA must be vigilant in

ensuring that those who potentially threaten aviation security do not enjoy a governmentally-issued license to engage in civil aviation. At the same time, TSA must afford appropriate due process protections to those affected by its actions. We will keep you apprised as we work on augmenting the administrative appeal process.

Sincerely yours,

A handwritten signature in cursive script that reads "Francine J. Kerner".

Francine J. Kerner
Chief Counsel

cc: Ms. Kathleen Yodice
Ms. Heidi Williams