Federal Aviation Administration

Memorandum

Date: JUL 21 2010

To: David W. Hempe, Manager, Aircraft Engineering Division, AIR-100

From: Rebecca MacPherson, Assistant Chief Counsel for Regulations, AGC-200

Subject: Meaning of Private Person as Used in 14 CFR Part 183

You have requested that the Office of the Chief Counsel render its opinion on the meaning of the term "private person" as used in 14 CFR Part 183, Representatives of the Administrator. Part 183 "describes the requirements for designating private persons to act as representatives of the Administrator in examining, inspecting and testing persons and aircraft for the purpose of issuing airman, operating, and aircraft certificates." Colloquially, these are known as part 183 designees. Subpart C describes the delegations available to individuals, and Subpart D describes organizational delegations.

The FAA's authority to delegate certain duties to representatives of the Administrator comes from the agency's authorizing legislation as part of its authority to issue certificates in 49 USC 44702. Paragraph (d) of that section states:

(d) DELEGATION. – (1) Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to –

(A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and

(B) issuing the certificate.

While used both in the statute and regulations, the term "private person" is not defined in either 49 USC 40102 or 14 CFR Part 1. There is no definition of private person elsewhere in the USC that would apply to Title 49 usage.

The need for the assistance of private individuals to aid in carrying out certain duties of the FAA has been recognized since the 1920s. Historically, the use of non-agency persons and organizations has assisted the FAA in accomplishing certain duties, and the unique status of designees as representatives of the Administrator was included in our authorizing legislation. Your questions address the scope of the term "private" and what

that term encompasses as far as the status of persons seeking delegation authority under Part 183.

It is clear that persons employed by the FAA do not qualify as private persons for purposes of Part 183 and may not be granted authority as a designee. The designee concept and all of the eventual programs that developed from it exist to supplement accomplishment of the agency's authorized functions. The same is true for organizations within the FAA, which exist only at the discretion of the Administrator and receive their authority from the Administrator. The authority to carry out specific functions is given to individuals and organizations in the agency by agency order from the Administrator.

The FAA has already expressed its policy on employees acting as designees. In FAA Order 8900.2, *General Aviation Airmen Designee Handbook* (effective 09/30/08), the following paragraph appears under the section entitled "Selection:"

> ***Note:*** *Current FAA employees will not be appointed as designees until their employment with the FAA has ended. FAA employees may not apply to the NEB earlier than 120 calendar-days before their actual date of retirement or separation from the agency. A letter of recommendation must accompany the application from management of their last assigned office. Appointments will be limited to functions performed while employed by the FAA, or other experience within the aviation industry. If a former FAA employee submits an application beyond 3 years from the date of separation, all application requirements apply.*

This policy also addresses your question whether a current FAA employee may be appointed as a designee for a function that is <u>not</u> within the scope of his employment duties. The phrase 'other experience within the aviation industry' is another post-employment limitation that prohibits current employees from holding a designation.

We have consulted with the Senior Attorney for Ethics who agrees that this policy is consistent with ethical considerations facing employees of the Executive Branch.

Regarding employees of other Executive Branch agencies, the same considerations do not apply and they may, with some caveats, be granted designee status. However, as noted by the Senior Attorney for Ethics:

> This does not mean that serving as an FAA designee is a viable part-time option for all non-FAA Executive Branch employees. A case-by-case determination should be made by the ethics official of the individual's employing agency or Department in consultation with the FAA's Ethics Counsel as necessary. To the extent that certain Executive Branch entities such as the Transportation Security Administration, the Department of Homeland Security, and in some instances the Department of Defense support the FAA's mission and jointly participate in FAA programs, their employees, especially those who actually participate in the joint programs, may be seen as having an appearance of a conflict when attempting to

serve as an FAA designee in a personal capacity. The same would hold true for FAA employees who wanted to serve as designees for another Executive Branch agency or Department.

Accordingly, we conclude that there can be different levels of 'private person' status depending on the individual's (or organization's) relationship with the FAA and the work to be performed. That relationship may require that a further investigation of the proposed designee's status and the perception of the relationship with the FAA before appointment as a designee would be considered appropriate.

Your final question concerns whether an organization of another federal agency may hold an organizational designee appointment. Since there is no bright-line restriction on individuals, the same considerations would appear to apply to organizations. We advise caution in considering organizational requests and the need for a delegated organization in specific situations and locations.

This response was prepared by Karen Petronis, Senior Attorney for Regulations of my staff, and coordinated with Lisa Baccus, Senior Attorney for Ethics in the Office of the Chief Counsel.