U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 26 2011

Mr. James W. Johnson
Senior Managing Attorney, Legal Department
Air Line Pilots Association, International
535 Herndon Parkway
P.O. Box 1169
Herndon, VA 20172-1169

Dear Mr. Johnson:

We have received your letter requesting a legal interpretation regarding the following two questions: (1) are the aircraft operated by Airborne Tactical Advantage Company, LLC (ATAC) pursuant to a government contract with the military "public aircraft," and (2) does the flight time of ATAC pilots when operating ATAC aircraft pursuant to a government contract constitute "other commercial flying" for purposes of 14 C.F.R. §121.517?

Your letter indicates that: (1) ATAC operates military aircraft pursuant to a government contract with the military; (2) the aircraft hold FAA-issued experimental airworthiness certificates; (3) ATAC pilots operate the aircraft pursuant to Temporary Additional Duty Travel Orders issued by the military; (4) ATAC pilots have Department of Defense (DOD) Clearance; (5) the operations are controlled by DOD and are in direct support of military units, and operate to and from military airfields; (6) the military pays for the fuel used; (7) the military assumes responsibility for ATAC's operations within the warning and restricted areas reserved exclusively for military activity; and (8) ATAC is funded through military contracts and the military pays for the pilots.

## I. Public Aircraft

Your first question is whether ATAC's aircraft, which are privately owned, would be considered public aircraft when operating under its contract for the military. Whether an operation qualifies as a public aircraft operation is a flight by flight determination . *See* 49 U.S.C. § 40125 (setting operation-specific criteria for determining public-aircraft status). In the case of aircraft contracted for by the Armed Forces to provide transportation or other commercial air service, the public aircraft statute requires a determination by the Secretary of Defense that the operation is required in the national interest. *See* 49 U.S.C. § 40125(c)(1)(C).

For other operations under contract, other parts of § 40125(c) may apply. However, FAA policy adopted in March 2011 states that all contract operations with government entities

will be considered civil operations subject to the regulations of 14 CFR until the FAA receives a declaration from the government entity that flights under the contract are considered valid public operations under the terms of the statute. *See*, Notice of Policy Regarding Civil Aircraft Operators Providing Contract Support to Government Entities (Public Aircraft Operations), 76 FR 16349 (March 23, 2011). Further, all public aircraft operations must take place within U.S. airspace. Once an aircraft leaves U.S. airspace, it loses public aircraft operation status.

Your request does not contain enough information to determine whether the flights described would qualify under the statute as public aircraft operations. The determination of need for such operation would be made initially by the contracting government entity. Because there are many factors involved in making a public aircraft operation determination for any given flight, we do not provide general guidance to operators or speculate on the operations necessary to fulfill a contract with a government entity.

**II. Other Commercial Flying**

Your second question asks whether the flight time of ATAC pilots when operating ATAC aircraft pursuant to a government contract constitutes "other commercial flying" for purposes of section 14 C.F.R. § 121.517. "'Other commercial flying' means any nonmilitary flying as a required crewmember, other than in air transportation, for which the crewmember is paid for his or her services." Feb. 2, 2009 Letter to Mr. D. Ward MacKenzie from Rebecca MacPherson, Assistant Chief Counsel for Regulations. Your letter does not provide enough information for the FAA to determine whether the pilots' flying for ATAC would be considered nonmilitary flying. As such, the FAA cannot determine, based on your letter, whether this flying constitutes "other commercial flying."

However, the FAA emphasizes that pilots have a general duty when flying civil aircraft to ensure that they are in a condition to operate the aircraft safely. Section 91.13(a) establishes an overarching requirement that "[n]o person may operate an aircraft in a careless or reckless manner, so as to endanger the life or property of another." The FAA has previously interpreted this provision to include lack of rest as "a circumstance which could endanger others, and it is not necessary that the situation devolve into actual endangerment for there to be a violation of FAR 91.13." Oct. 28, 1991, Letter to David Bodlak, from Donald P. Byrne, Assistant Chief Counsel, Regulations and Enforcement Division [1991-57]. A certificate holder who uses a crewmember with knowledge of his or her lack of rest may be equally culpable along with the flight crewmember. *See id.* Accordingly, regardless of whether the time spent by pilots in ATAC operations counts as "other commercial flying," the pilots must be adequately rested so as to ensure safe civil operations.

This response was prepared by Alex Zektser, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and

Commercial Division of the Flight Standards Service. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations
Office of the Chief Counsel, AGC-200