COMMENTS OF THE
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
DEPARTMENT OF JUSTICE

CRIMINAL HISTORY BACKGROUND CHECKS;
REQUEST OF COMMENTS
Docket No. OLP 100

August 5, 2005

The Transportation Trades Department, AFL-CIO (TTD) is pleased to submit these comments in response to the Department of Justice's (DOJ) request for comments regarding criminal history background checks. By way of background, TTD consists of affiliated unions representing workers in virtually every mode of transportation, including workers who currently have to undergo criminal history checks mandated by the federal government as a condition of employment or who could reasonably face these checks in the near future. We thus have a direct stake in this proceeding and in particular the report the Attorney General (AG) is required to submit to Congress on ways to improve, standardize and consolidate criminal history records checks conducted for non-criminal justice purposes, including for employment screening. In fact, we would note that Section 6403 of the Intelligence Reform and Terrorism Prevention Act of 2004 specifically mandates that the AG must consult with representatives of labor in drafting this report.

As a general matter, we obviously agree that the security of our nation's transportation systems must be enhanced and have forcefully advocated for programs and measures that will accomplish this objective. We understand that security threat assessments, including a criminal background check component, is a part of our national response to the terrorist threat that faces our nation. In light of this reality, it is imperative that criminal background check regimes, when they are implemented, be done in a fair, balanced and reasonable manner. Specifically, criminal background check mandates must provide workers with basic due process rights, ensure privacy protections, be rationally related to the legitimate security goals, provide a national standard rather than multiple state standards, and must allocate costs fairly and not simply impose them exclusively on workers.

A background check regime that ignores these elements or otherwise seeks to presuppose that everyone with a criminal record is a terrorist threat, will not serve the long-term interests of securing our nation. Indeed, it must be remembered that transportation workers, those most likely to be subject to background checks, are often the eyes and ears of the industry and are in an excellent position to contribute to enhancing security. If we turn these workers into a suspect class, it will make cooperation and coordination with employees that much more difficult. To avoid this pitfall, we urge the DOJ to consider our comments and to incorporate the projections and policies advocated by transportation labor.

Disqualifying Offenses

In many areas of transportation, criminal background checks have been included as part of a broader "security threat assessments" that workers must go through in order to work in their industry. Specifically, a worker will be prevented from holding some type of transportation security credential if the worker committed a so-called "disqualifying offense or felony" within a certain time frame. Unfortunately, many of the disqualifying offenses are overly broad and are not adequately focused on eliminating true security risks.

For example, under the aviation rules and those issued by the Transportation Security Administration (TSA) implementing security threat assessments for Hazmat truck drivers, a worker can be disqualified for committing a felony involving dishonesty, fraud, or misrepresentation. While crimes covered in this description can of course not be condoned, we question whether it automatically makes someone a security risk. In addition, there are rules that bar someone from committing a "felony involving a threat," theft, or burglary. And while it was eventually eliminated, TSA originally included possession of a controlled substance in its list of disqualifying offenses. Again, individuals who commit these and other crimes should be punished as appropriate, but the federal government must not assume that anyone who commits these offenses is a security risk. For these reasons, we ask that the DOJ recommend that there be a clearer nexus between disqualifying felonies and national security. In short, only felonies that cause someone to be an actual terrorism security risk to the United States should be included as disqualifying crimes.

We are also concerned that federal security threat assessments rely on whether a crime constitutes a felony in a particular state. Obviously, what might be a felony in one state may not rise to that level in another jurisdiction. This potential conflict and inconsistency raises a basic fairness and uniformity question that should be addressed. While states are indeed permitted to establish their own criminal penalties for state crimes, the federal government should not permit a potential hodgepodge of standards to determine which employees pose a security risk.

Waiver and Appeal Process

Given the inherent injustices that can be created by disqualifying offenses, it is critical that a fair and balanced waiver process be included that will allow workers who have committed a disqualifying felony to demonstrate that they are nonetheless not a security risk. In fact, TTD and our affiliated unions fought to include such a right as part of the background check process

in the Maritime Transportation Security Act (MTSA).[1] This waiver process was subsequently adopted by TSA for Hazmat truck drivers and in doing so the TSA found that "individuals who have committed a disqualifying crime may be rehabilitated to the point that they may be trusted in potentially dangerous job, such as the transportation of hazardous materials."[2]

We obviously agree with this observation and appreciate TSA's inclusion of this right. However, it must be noted that aviation workers, whose background checks were instituted before passage of the MTSA, do not enjoy a waiver right. The result is that countless aviation employees, who have committed offenses that nobody believes make them a security risk, have nonetheless been forced out of the industry with no recourse. This discrepancy must be addressed and we urge the DOJ to take the position that all workers subject to a criminal background check have access to robust waiver process.

We also remain concerned that the waiver right, when it has been granted, requires employees to apply back to the agency that decided the individual was a security risk in the first place. Given the high public anxiety over terrorism, we believe that political pressure will force federal agencies to reject many meritorious waiver requests. Indeed, no political official would want to be charged with neglecting homeland security to give a convicted felon a second chance. To address this problem, decisions regarding waivers and appeals should be made by an Administrative Law Judge (ALJ) at a hearing on the record or at least some other independent person. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressure or subject to agency interference. In addition, ALJ decisions would establish case precedent that would better define what constitutes a security risk. This would bring a level of fairness and consistency to a system that is central both to employee rights and national security.

Ensuring Uniformity and Consistency

As criminal background checks proliferate, we must ensure that there is a level of consistency across various programs and that workers are not needlessly subjected to multiple and conflicting reviews. We are especially concerned with allowing states to impose additional security threat assessments on workers, and to do so without any of the protections or limits included in the federal program. Furthermore, if one state did indeed adopt "stricter" security standards, any would-be terrorist need only apply for a job in another state. If security threat assessments are needed to enhance our national security, then a national standard should be adopted and enforced. It makes little sense to establish a national program and then allow local jurisdictions to use national security as an excuse to create yet another security review process.

We also note that employees who must work in Customs Agency controlled areas in facilities are subject to separate background checks that give individual port directors great leeway in making these decisions. In particular, a port director can use a felony conviction to disqualify someone even if that felony was committed well beyond the seven or 10 year look back period that is the norm under MTSA and the aviation statute, respectively. In fact, there have been several situations where an airport worker, after passing an extensive background check required by the

[1] See, 46 U.S.C. 70105.
[2] 68 Fed. Reg. 23864 (May 5, 2003).

aviation statute, had his or her customs credentials pulled because of felony convictions older than the 10 year standard across the aviation industry. This double standard makes no sense and has absolutely no security based rationale.

Privacy Protections

It is crucial that the privacy and confidentiality of the information collected and generated by the security threat assessment process is maintained. It is imperative that the privacy rights of workers be respected and for employers to be denied access to raw data on employee criminal history records. The authority granted by Congress to conduct these background checks is intended for the sole purpose of enhancing national security. Giving employers access to federal databases or raw data on employees would give employers access to information far outside the scope of the law, and create a potential for abuse both by private interests and the government, that is simply unwarranted. Any requests made by industry or others to have access to raw data should be completely rejected as contrary to the purpose of conducting threat assessment and inconsistent with a worker's right to privacy. We also request that workers have an ability to request information about their criminal background file and to correct any inaccuracies.

Allocating Costs Fairly

As background checks are mandated, the government must ensure that the costs of the program are allocated fairly and not simply imposed on workers. Congress and the Administration have obviously made a policy determination that background checks on certain segments of the workforce are a necessary component of the war on terror. Given this reality, it stands to reason that the government has some obligation to cover the costs of this mandate.

We do recognize that since passage of the USA Patriot Act, legislation was enacted requiring TSA to "charge reasonable fees for providing credentialing and background investigations in the field of transportation." (P.L. 108-90, Section 520). However, this mandate must be implemented with the premise that threat assessments are part of our national response to terror.

In fact, nothing in the legislation requires fees to be imposed solely on workers. Indeed, TSA stated in the preamble to the proposed rule for Hazmat truck drivers that the NPRM will "allow TSA to spread the costs associated with the processing of background threat assessments in an equitable manner among the affected parties."[3] This is an admirable goal, but quite frankly it is not what the proposed rule accomplishes. To the contrary, it imposes fees only on one "affected party" – Hazmat drivers. Employers are not required to contribute anything nor are companies that use hazardous materials. This problem should not be repeated as background checks are implemented in other modes.

It must be remembered that the DHS Appropriations Act only requires TSA to charge reasonable fees to "conduct" or "provide" background checks. At a minimum, we believe that this language allows the federal government to absorb costs that are not directly related to providing actual checks.

[3] 69 Fed. Reg. 65342.

We also maintain that employers should not be exempt from covering some of the costs incurred from conducting background checks. While some employers are doing this now, either voluntarily or pursuant to a collective bargaining agreement, the federal government should not simply impose costs on workers with the hope that employers will step in to defray the costs. It must be remembered that it is the workers who must spend time applying for the security threat assessment, and could likely bear additional costs if an appeal or waiver is subsequently needed. To insist that this workforce also pay for one hundred percent of the costs of a background check is neither fair nor grounded in sound public policy.

Conclusion

Individual workers, and their unions, should be viewed as partners in the effort to enhance security. An overly intrusive or unworkable background check program will render this partnership ineffective, and only make it more difficult for workers, the government, and employers to work together on common security problems. It is crucial that these goals of improving transportation security be implemented to truly advance the goals of screening for security risks without unnecessarily attacking the due process and privacy rights of workers.

We urge the Department of Justice, in its to report to Congress, to incorporate the suggestions made by TTD and our affiliated unions so that when criminal background checks are mandated, it is done in a manner that is fair, balanced, and enhances transportation security.

Respectfully Submitted,

Edward Wytkind, President

Lawrence I. Willis, General Counsel
888 16th Street, N.W., Suite 650
Washington, D.C. 20005
202/628-9262