

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-14455  
Non-Argument Calendar

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Agency No. TSA 140866

CALVIN ALEXANDER,

Petitioner-Appellant,

versus

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent-Appellee.

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Petition for Review of a Decision of the  
Transportation Security Administration

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(August 30, 2021)

Before JORDAN, NEWSOM and DUBINA, Circuit Judges.

PER CURIAM:

Petitioner/Appellant Calvin Alexander petitions for review of the Transportation Security Administration's ("TSA") determination that Alexander is ineligible to serve as a flight crew member due to two disqualifying criminal convictions. *See* 49 U.S.C. § 44936(b)(1)(B)(xiv)(V) (prohibiting air carriers from employing individuals who have committed a felony involving dishonesty, fraud, or misrepresentation within the last 10 years). On petition for review, Alexander contends that the TSA's determination violates his due process rights and that the statute upon which the TSA relied to disqualify him is unconstitutionally vague. After reading the parties' briefs and reviewing the record, we deny the petition for review.

## I.

Alexander is a commercial pilot who, in June 2012, pled guilty to knowingly and willfully making false statements regarding his birth date on his application for a pilot certificate, in violation of 18 U.S.C. § 1001, and knowingly and willfully using and attempting to use a passport obtained by reason of a false statement, in violation of 18 U.S.C. § 1542. Although the offenses would disqualify him from serving as a flight crew member, these offenses did not appear in the criminal history record checks provided to the TSA; thus, the TSA inadvertently deemed him eligible as a flight crew member.

In September 2019, Alexander applied to serve as a flight crew member with the private charter operator Kalitta Air. TSA performed a criminal history record check and discovered Alexander's prior convictions. TSA erroneously concluded that the convictions were outside of the relevant disqualification time period and approved his application. The TSA realized its mistake in June 2020 when Alexander renewed his application to serve as a flight crew member with Ace Aviation Service Corporation, a Twelve-Five operator ("Ace Aviation"). The TSA sent Alexander a preliminary determination of ineligibility on June 9, 2020, explaining that he might be ineligible to serve as a flight crew member for Ace Aviation because of his criminal history. The TSA provided Alexander with information regarding the appeals process, stated that he could request pertinent materials on which the TSA based its preliminary determination, and informed him that he should reply within 60 days or request an extension of time to reply. The TSA also informed Alexander that he could not request a waiver because the criminal history standard is not waivable. Alexander requested an appeal of the preliminary determination, an extension of time, the pertinent materials, and a waiver.

On August 10, 2020, the TSA issued a similar preliminary determination of ineligibility in connection with Alexander's employment with Kalitta Air. In the determination letter, the TSA provided the same information it provided in the

preliminary determination regarding Alexander's employment with Ace Aviation. The TSA also granted Alexander's request for an extension of time in connection with his appeal of the agency's June 2020 preliminary determination and enclosed the requested documents that TSA reviewed in making its eligibility determination. Alexander appealed both preliminary determinations.

In September 2020, the TSA issued a final determination of ineligibility, informing Alexander that it would notify both Ace Aviation and Kalitta Air that he was not eligible to serve as a flight crew member. The agency stated that it had reviewed the preliminary determination, the appeal request and the supporting documentation, and confirmed that Alexander was ineligible to serve as a flight crew member. The agency stated that individuals who have been convicted of a felony involving dishonesty, fraud, or misrepresentation are ineligible to serve as flight crew members onboard flights covered by the Twelve-Five program and the Private Charter program for 10 years following the date of conviction, pursuant to 49 U.S.C. § 44936(b)(1)(B)(xiv)(V) and 49 C.F.R. § 1544.230(b). The agency acknowledged that the prior determinations of eligibility were erroneous but reiterated that convictions for a disqualifying criminal offense within 10 years of the flight member's application cannot be waived. The agency informed Alexander that his convictions will cease to be disqualifying on June 27, 2022.

Alexander petitioned for review of the TSA's final determination with this court. *See* 49 U.S.C. § 46110. On April 26, 2021, Alexander simultaneously filed his initial brief and a motion to stay the agency's decision pending resolution of the petition, and the government opposed the motion. This court denied the motion on June 29, 2021.

## II.

An agency action is entitled to great deference. “Under the Administrative Procedure Act, a court shall set aside an action of an administrative agency where it is arbitrary, capricious, or an abuse of discretion.” *Preserve Endangered Species Areas of Cobb's History Inc. v. United States Army Corps of Eng'r*, 87 F.3d 1242, 1246 (11th Cir. 1996) (citing 5 U.S.C. § 706(2)(A)). We review *de novo* legal issues, including claims of due process violations and allegations that a statute is unconstitutionally vague. *See Schwarz v. Kogan*, 132 F.3d 1387, 1390 (11th Cir. 1998) (reviewing whether state bar rule violates due process); *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000) (reviewing the constitutionality of a statute).

## III.

### A. Due Process

Alexander claims that the TSA violated his procedural due process rights under the Fifth Amendment because the agency did not provide him notice and an

opportunity to be heard before making its final ineligibility determination. Our review of the record demonstrates to us that this claim is without merit.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (quotation marks omitted). Due Process “is not a technical conception with a fixed content,” *id.* at 334, 96 S. Ct. at 902, but rather, is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). Under the *Mathews* balancing test, a court evaluates (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903.

In issuing its two preliminary determinations of eligibility, the TSA provided Alexander with full notice that the agency had identified two disqualifying convictions in his criminal history report. Although the TSA informed Alexander that it could not waive the federal eligibility requirements, it explained the appeal process to Alexander. The TSA also provided Alexander an opportunity to obtain

the materials upon which the TSA relied in making its determination, to correct any possible errors in his criminal history report with the FBI directly, and to submit additional information to the TSA. Alexander availed himself of the agency's appeals process: he retained counsel, requested an extension of time to respond, requested and obtained the criminal history record check reports, and submitted a written request for waiver. Thus, no further process was due Alexander regarding his flight crew member eligibility. *See e.g. Concepcion v. TSA*, 709 F. App'x 876, 879 (9th Cir. 2017) (agency complied with due process where it provided "written notice of its initial decision, invited [plaintiff] to challenge its reasoning and findings, which he did, and then issued a written final decision laying out its conclusions and responding to his arguments").

The record demonstrates that Alexander received all the due process required; thus, we deny the petition for review on this ground.

#### B. Vagueness

Alexander argues that the statute upon which the TSA relied in making its ineligibility determination, 49 U.S.C. § 33936(b)(1)(B)(xiv)(V), is unconstitutionally vague. Specifically, Alexander claims that the statute is unconstitutionally vague as applied to him because his convictions involved mistaken falsehoods. We disagree and find no merit to Alexander's contention.

“To overcome a vagueness challenge, statutes must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly and must provide explicit standards for those who apply them.” *Leib v. Hillsborough Cnty. Pub. Transp. Comm’n*, 558 F.3d 1301, 1310 (internal quotation marks omitted). The Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 1193 (1982). Courts will find a civil statute unconstitutionally vague if “it is so indefinite as really to be no rule or standard at all.” *Leib*, 558 F.3d at 1310 (internal quotation marks omitted).

We conclude that the statute at issue here is unambiguous. It prohibits “an air carrier” from “employ[ing] . . . an individual [with unescorted access to aircraft or certain secured areas of airports]” if an investigation “establish[es] that, in the 10-year period ending on the date of the investigation, the individual was convicted . . . of . . . a felony involving . . . dishonesty, fraud, or misrepresentation.” 49 U.S.C. § 44936(b)(1)(B)(xiv)(V). The statute clearly puts both the ordinary person and an air carrier on notice that certain felony offenses disqualify prospective employees from certain jobs for a ten-year period following the date of conviction. *See Leib*, 558 F.3d at 1310.



Alexander contends that the statute is vague as applied to him because there was nothing particularly material about his alleged falsehood. Alexander claims that the conduct underlying his two convictions, falsifying and misrepresenting his age on federal forms, did not make him a security risk to the TSA and did not pose a threat to civil aviation. This contention is insufficient to render the statute unconstitutionally vague. The statute puts a reasonable person on notice of the conduct it prohibits.

For the aforementioned reasons, we deny Alexander's petition for review of the TSA's final determination of ineligibility.

PETITION FOR REVIEW DENIED.