



**MOUNTAIN STATES LEGAL
FOUNDATION**
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May 22, 2024

VIA MAIL AND E-MAIL

Assistant Administrator for Finance and Management (AFN-1)
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591
FOIA-Appeals@faa.gov

Re: *Appeal of Denial of Expedited Processing: FOIA Request 2024-04601*

Dear Assistant Administrator for Finance and Management:

I am an attorney with Mountain States Legal Foundation, and I write to appeal the denial of my request for expedited processing with respect to FOIA Request 2024-04601. These requests relate to the use of race within the FAA, as well as its internal training processes that emphasize race. While I believe that any individual may be capable of becoming a successful Air Traffic Controller or other FAA employee—regardless of race—it is important that the FAA be race neutral, both for legal and safety reasons.

As you know, on May 8, 2024, I submitted several requests for records with the Federal Aviation Administration (FAA), including but not limited to the following items:

- E-mails sent by FAA Administrator Michael Whitaker mentioning the word “diversity”
- E-mails sent by FAA Administrator Michael Whitaker mentioning the term “anti-racist”
- E-mails sent by FAA Administrator Michael Whitaker mentioning the word “microaggression”
- E-mails sent by FAA Administrator Michael Whitaker mentioning the term “DEI”
- E-mails sent by FAA Administrator Michael Whitaker mentioning the term “personality test” or “personality tests”
- Records of any hiring criteria used by any hiring official between 2021 and the present within the FAA that use either the word “diverse” or diversity”
- Records of any interview questions published between 2021 and the present asked of potential hires that use either the word “diverse” or diversity”
- Training materials sent to FAA employees published between 2021 and the present that refer to the word “equity”
- Training materials sent to FAA employees published between 2021 and the present that refer to the word “whiteness”

As is obvious, I am interested in the FAA's efforts to use race as a factor in its hiring, retention, and promotion decisions, particularly when it comes to the hiring pool of Air Traffic Controllers. Based on its prior misconduct with respect to using Biographical Assessments in hiring, I have reason to suspect that the FAA has recently adopted "personality tests" and other "diversity" measures as a way of attempting to racially balance the workforce of Air Traffic Controllers, and skirt Congressional directives to stop using Biographical Assessments. As I note above, while individuals of any race may be successful Air Traffic Controllers, anything less than race neutrality is both unlawful and dangerous.

Separately, I am very concerned that the FAA is unlawfully creating a racially hostile workplace in violation of Title VII of the Civil Rights Act, which bars race discrimination in employment. While such an effort may be consistent with President Biden's "whole-of-government" approach to advancing "equity," it is illegal under federal civil rights laws. *See, e.g., Young v. Colorado Department of Corrections*, 94 F.4th 1242, 1251 (10th Cir. 2024) ("Taken seriously by managers and co-workers, the messaging could promote racial discrimination and stereotypes within the workplace. It could encourage racial preferences in hiring, firing, and promotion decisions.").

On May 13, 2024, the Federal Aviation Administration acknowledged my FOIA requests, but included the following denial of expedited consideration:

Your request for expedited processing has been denied as you have not shown a compelling need based on imminent threat to life or physical safety to an individual, nor a particular urgency to inform the public of an actual or alleged Federal Aviation Administration activity beyond the public's right generally to know about Government activity.

The FOIA Officer who made this determination was Sheree L. DeBerry. Respectfully, this conclusion was erroneous, because it fails to take into account the life-or-death nature of air travel, especially as it relates to the consideration of race in hiring, retention, or promotion, and particularly in light of recent aviation incidents.

As pointed out by former Attorney General of Nevada Adam Laxalt, air travel mishaps are becoming more common:

There have been a number of horrifying incidents in just the first four months of this year, including two near collisions at JFK and D.C.'s Reagan National last month and one collision on the tarmac at Boston's Logan Airport. In August of last year, The New York Times reported that there were at least 46 close calls of airplane collisions that year, and close calls were happening multiple times per week.

Laxalt, *DEI has jeopardized air safety*, WASHINGTON TIMES, May 14, 2024.¹ As Mr. Laxalt also notes, the FAA itself has acknowledged a shortage of qualified Air Traffic Controllers. So if the FAA is using race in its screening mechanisms, or creating a hostile work environment for some

¹ <https://www.washingtontimes.com/news/2024/may/14/dei-has-jeopardized-air-safety/>

of its employees based on race, it is hardly any wonder why such a practice could lead to a shortage—qualified applicants are screened out or pushed out, while applicants who would otherwise not obtain jobs are less likely to succeed and continue on as Air Traffic Controllers.

In sum, Ms. DeBerry’s conclusion that my requests do not relate to an imminent threat to life or physical safety of individuals ought to be rejected, and full and complete responses to my FOIA requests ought to be expedited. The public deserves to know whether the FAA is endangering travelers and others throughout the country.

Additionally, this reasoning suffices to establish that my appeal ought to itself be expedited. *See* 49 C.F.R. § 7.3(c)(1)(i) (“An appeal is processed out of order and given expedited treatment whenever a compelling need is demonstrated and DOT determines that the compelling need involves: (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual”).

And this letter ought to satisfy the requirement to submit a statement explaining in detail why the FOIA requests ought to be expedited. *See* 49 C.F.R. § 7.3(c)(3) (“A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that individual’s knowledge and belief, explaining in detail the basis for requesting expedited processing.”).

Thank you for your time and consideration. Please contact me with any questions.

Sincerely,

/s William E. Trachman

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