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Title 6 — Domestic Security

Chapter I — Department of Homeland Security, Office of the Secretary

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PART 126—TRANSPORTATION SECURITY OVERSIGHT BOARD REVIEW PANEL PROCESS AND PROCEDURES

Authority: 49 U.S.C. 115, 46111; Department of Homeland Security Delegation No. 7071.1.

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§ 126.1 Purpose and scope.

This part establishes the procedures by which a Transportation Security Oversight Board (TSOB) Review Panel reviews and acts to resolve an appeal from an Administrative Law Judge (ALJ) decision regarding a Determination of Security Threat made by the Administrator of the Transportation Security Administration (TSA).

§ 126.3 Definitions.

Classified information has the meaning given to that term in Executive Order 13526 or any successor Executive Order.

Communication technology means telephone or a videoconferencing platform.

Other protected information means other information that the government is authorized by statute, regulation, or Executive order to withhold.

Sensitive Security Information (SSI) means information described in 49 CFR 1520.5.

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Transportation Security Oversight Board (TSOB) means the board established pursuant to 49 U.S.C. 115.

Transportation Security Oversight Board (TSOB) Review Panel means the panel established pursuant to 49 U.S.C. 46111(d) to consider an appeal from a decision of an administrative law judge as the result of a hearing under 49 U.S.C. 46111(b).

§ 126.5 Appointment of TSOB Review Panel and TSOB Docket Clerk.

- (a) Upon request by the Chairman of the TSOB, TSOB members will designate at least one official who meets the criteria in paragraphs (a)(1) through (5) of this section to participate in a TSOB Review Panel pool for a period of two years. The Review Panel nominees must—
 - (1) Be a member of the Senior Executive Service (SES) or a Senior Level (SL) employee;
 - (2) Hold a security clearance commensurate with the record under review;
 - (3) Not be employed by TSA or the Federal Aviation Administration (FAA);
 - (4) To the extent practicable, have a legal background and be engaged in the practice of law on behalf of the United States Government; and
 - (5) To the extent practicable, be familiar with transportation security issues.
- (b) Upon the expiration of each two-year period, TSOB members will again designate officials to participate in the TSOB Review Panel pool.
- (c) The General Counsel of the Department of Homeland Security, or the General Counsel's designee, will appoint an individual from within the Office of the General Counsel to serve as the TSOB Docket Clerk. The TSOB Docket Clerk will serve as the TSOB Review Panel's point of contact for both the public and the parties to ALJ proceedings.
- (d) When the TSOB Docket Clerk receives a properly and timely filed appeal from an ALJ's decision, the TSOB Chairperson selects at least three individuals from the TSOB Review Panel pool to serve on a Review Panel to review the ALJ's decision. The TSOB Chairperson has discretion to choose which individuals from the pool will serve on a TSOB Review Panel. In making selections for a TSOB Review Panel, the TSOB Chairperson will consider selecting at least one person with the qualifications set out in paragraph (a)(4) of this section to serve as a Panel Member, and will consider, based upon the composition of the pool as well as the issues raised in the appeal, appointing more than one person with the qualifications set out in paragraph (a)(4) to the TSOB Review Panel.

§ 126.7 Function of TSOB Review Panel.

A TSOB Review Panel reviews an ALJ's decision regarding a Determination of Security Threat issued by the TSA Administrator and may affirm, modify, or reverse the ALJ's decision. The TSOB Review Panel also may remand the matter to the ALJ with instructions to address particular issues or consider additional testimony or evidence.

§ 126.9 Scope of review.

- (a) A TSOB Review Panel reviews an ALJ's decision to address whether the decision is supported by substantial evidence in the record before the TSOB Review Panel.
- (b) A TSOB Review Panel will not consider the constitutionality of any statute, regulation, Executive order, or order issued by the TSA.

§ 126.11 Counsel.

- (a)
 - (1) Parties to proceedings before a TSOB Review Panel may be represented by an attorney who is in good standing with the bar of any State, district, territory, or possession of the United States. Parties desiring representation must obtain such representation at their own expense.
 - (2) TSA will designate counsel to represent TSA before a TSOB Review Panel. The attorney must hold a security clearance that enables access to all materials related to the appeal.
- (b) The General Counsel of the Department of Homeland Security, or the General Counsel's designee, will appoint legal counsel to assist a TSOB Review Panel. Counsel appointed to assist the TSOB Review Panel will facilitate communication between the TSOB Docket Clerk and the TSOB Review Panel, and assist with legal research and drafting for the Panel, as needed. Appointed counsel must hold a security clearance that enables access to all materials related to the appeal.

§ 126.13 Notice of appeal and service.

- (a) **Notice of appeal.** A party seeking review of the ALJ's decision must file a notice of appeal with the TSOB Docket Clerk electronically at TSOB_docket@hq.dhs.gov or via certified U.S. mail at ATTN: TSOB Docket Clerk, Office of the General Counsel, Department of Homeland Security, Washington, DC, 20528-0485. A notice of appeal must be filed within 60 calendar days of the date of issuance of the ALJ's written decision.
- (b) **Service.** To file any document with a TSOB Review Panel, a party must send the document to the TSOB Docket Clerk electronically at TSOB_docket@hq.dhs.gov, or via certified U.S. mail at ATTN: TSOB Docket Clerk, Office of the General Counsel, Department of Homeland Security, Washington, DC, 20528-0485. Parties are strongly encouraged to file all documents and consent to electronic service. A party may consent to electronic service by filing a document expressly stating such a preference with the TSOB Docket Clerk and serving a copy on all other parties. Any document filed with the TSOB Docket Clerk (except a notice of protected information, the administrative record, ex parte motions, and documents containing classified information, Sensitive Security Information (SSI), or other protected information that accompanies a motion to supplement the record) must also be served on all other parties by certified U.S. mail or electronically/electronic service.
- (c) **Filing date.** For purposes of all deadlines in this part, the date of filing of a notice of appeal or any document filed with a TSOB Review Panel is the date on which the document is received by the TSOB Docket Clerk.

- (d) **Untimely appeals.** A TSOB Review Panel must reject and summarily dismiss a notice of appeal that is filed more than 60 calendar days after the date of issuance of the ALJ's written decision. A TSOB Review Panel may, in its discretion, accept an untimely notice of appeal upon a written showing of good cause for failure to meet the filing deadline.
- (e) **Failure to perfect the appeal.** A TSOB Review Panel may dismiss an appeal, on its own initiative or upon motion of any party, when a party has filed a notice of appeal but failed to perfect the appeal by timely filing a brief in accordance with § 126.23.
- (f) **Effect of dismissal of appeal.** Where an appeal is dismissed in accordance with paragraphs (d) or (e) of this section the ALJ's written decision becomes final.

§ 126.15 Entry of appearance.

- (a) All parties to a proceeding before a TSOB Review Panel must enter their appearances in writing with the TSOB Docket Clerk within 15 calendar days after filing or being served with a notice of appeal. A party's written notice of entry of appearance must identify counsel, if applicable.
- (b) Counsel beginning representation of a party after that party has already entered an appearance must file a separate notice of entry of appearance within 15 calendar days of beginning representation.

§ 126.17 Procedures for classified information, Sensitive Security Information (SSI), and other protected information.

- (a) **Notice of protected information.** Within 30 calendar days of filing or being served with a notice of appeal, TSA must file a notice of protected information indicating whether the record of proceedings before the ALJ contains classified information, SSI, or other protected information. The notice of protected information must be filed with the TSOB Docket Clerk in accordance with § 126.13(b). If the TSA presented classified information, SSI, or other protected information to the ALJ at an ex parte proceeding or provided such information for in camera review during the ALJ proceedings, then the TSOB Review Panel will also consider that information at an ex parte proceeding or in camera.
- (b) **Access to protected information.** A TSOB Review Panel may not disclose Classified Information or other protected information to any non-government party or counsel. A TSOB Review Panel may not disclose SSI to any non-government party or counsel unless the TSA has determined that the party had a preexisting need to know specific SSI as a covered person pursuant to 49 CFR 1520.7 and 1520.11.

§ 126.19 Filing and supplementing the record.

- (a) **Filing the record.** The TSA must file a complete record of administrative proceedings, including a certified and unredacted transcript of all proceedings before the ALJ (including ex parte proceedings) and all material filed with the ALJ (including material containing classified information, SSI, or other protected information that was reviewed by the ALJ in camera), with the TSOB Docket Clerk within 30 calendar days after filing or being served with a notice of appeal. Upon motion filed by the TSA, or on its own initiative, the TSOB Review Panel may extend the time to file the record. The TSOB Docket Clerk notifies all parties of the date when the record is filed. Within 30 calendar days of the date the record is filed, non-government parties may file a motion requesting that the TSA provide them with a redacted copy of any part of the record (excluding ex parte proceedings and materials reviewed in camera) that they do not possess. The TSA redacts classified information or other protected information from any part of the record it provides to non-government parties, except to the extent that the TSA has determined that the party had a preexisting need to know specific SSI as a covered person pursuant to 49 CFR 1520.7 and 1520.11.

(b) **Supplementing the record.**

- (1) A party may file a motion to supplement the record when anything relevant to an issue on appeal occurs after the ALJ issued a decision, or the party can show good cause, as determined by the TSOB Review Panel, for failing to submit material for the record at an earlier stage of the administrative proceedings. When the TSA seeks to supplement the record with material that contains classified information, SSI or other protected information, it may file a motion to supplement the record ex parte.
- (2) A TSOB Review Panel may grant a motion to supplement the record when it finds that the supplemental material is relevant to an issue on appeal and that a condition described in paragraph (b)(1) of this section applies.
- (3) A TSOB Review Panel may grant a motion to supplement the record by remanding the case to the ALJ for additional proceedings, where good cause is shown.

§ 126.21 Motions.

(a) **Form of motions.**

- (1) A motion filed with a TSOB Review Panel must comply with the requirements set forth in § 126.23(c)(1) through (4).
- (2) Motions must be filed with the TSOB Docket Clerk and served on all parties in accordance with § 126.13(b). The TSOB Docket Clerk provides all motions to the TSOB Review Panel.

(b) **Duty to confer.** Before filing any motion, a party must confer or make reasonable, good-faith efforts to confer with all other parties to resolve the issues that are the subject of the motion. The moving party must state in the motion, or in a certificate attached to the motion, the specific efforts made to comply with this duty to confer. The moving party must also state in the motion the other parties' positions with regard to the relief requested. If no party opposes the relief requested in a motion, the moving party includes "Unopposed" in the motion's title. TSA does not have a duty to confer before filing an ex parte motion, but must provide notice to all parties that it has made an ex parte filing.

(c) **Motion hearings.** Upon request of any party, or on its own initiative, a TSOB Review Panel may order the parties to appear for a hearing on any motion that was not filed ex parte. Motion hearings may be conducted via communication technology unless all parties agree to appear in person or the TSOB Review Panel in its discretion determines that an in person appearance is necessary for efficient administration of the hearing. The Review Panel considers expense and inconvenience to the parties, the importance of information security, and the quality and reliability of available communication technology when making these determinations.

(d) **Disposition.** A TSOB Review Panel may, consistent with the requirements of due process and after providing the opposing party with an opportunity to review and respond, grant or deny a motion at any time after it is filed.

(e) **Additional procedural requirements for motion practice.** A TSOB Review Panel has discretion to establish via order served on the parties, additional procedural requirements regarding motion practice in response to the exigencies of a particular appeal. Such requirements may include, for example, time periods for filing responses and replies, a deadline for concluding all motion practice, and page limitations different from the default 35-page limit established in § 126.23(c)(3). A TSOB Review Panel may not require disclosure of classified information, SSI, or other protected information.

§ 126.23 Briefs.

(a) **Appellant brief.**

- (1) A party appealing the ALJ's decision must perfect the appeal by filing an appellant brief with the TSOB Docket Clerk and serving that brief on all other parties in accordance with § 126.13(b) within 60 calendar days after the date on which TSA files the record in accordance with § 126.19(a), unless all parties consent to an extension of the filing deadline and provide notice of such agreement to the TSOB Docket Clerk or the TSOB Review Panel extends the filing deadline upon a motion by the appellant.
- (2) The appellant brief must enumerate the appellant's objections to the ALJ's decision.

(b) **Appellee brief.** Within 30 calendar days after being served with an appellant brief, a party may file an appellee brief in response with the TSOB Docket Clerk. Any such brief must be served on all other parties in accordance with § 126.13(b) at the same time it is filed with the TSOB Docket Clerk. The parties may consent to an extension of the filing deadline and provide notice of such agreement to the TSOB Docket Clerk or the TSOB Review Panel may extend the deadline for filing an appellee brief upon a motion by the appellee.

(c) **Brief requirements.** A brief submitted to a TSOB Review Panel must adhere to the following specifications:

- (1) The brief must be typewritten in Times New Roman, 12-point font, double-spaced, and, if submitted as a hard copy via certified U.S. mail, must be printed single-sided on 8 1/2-by-11 inch paper;
- (2) The brief must set forth the name, address, email address, and telephone number of the party or attorney filing it;
- (3) The brief must contain no more than 35 pages of text (excepting any tables, appendices, or cover sheets) unless prior permission to file excess pages has been granted by the TSOB Review Panel after consideration of a duly filed motion showing good cause as determined by the TSOB Review Panel;
- (4) If submitted as a hard copy via certified U.S. mail, the brief must be bound in any manner that is secure, does not obscure the text, and permits easy reproduction; and
- (5) If oral argument is desired, the brief should contain a request for oral argument that explains why oral argument will contribute substantially to the development of an issue on appeal.

§ 126.25 Oral argument.

- (a) Upon receipt of a request from any party contained in a brief or in a motion, or on its own initiative, a TSOB Review Panel may order the parties to present oral argument. The Review Panel orders oral argument if it determines that oral argument will contribute substantially to the development of an issue on appeal.
- (b) A TSOB Review Panel has discretion, within the requirements of all relevant statutory and regulatory provisions for information security, to choose the method and location of oral argument. The Review Panel will consider expense and inconvenience to the parties, the importance of information security, the quality and reliability of available communication technology, and concern for the efficient administration of proceedings when establishing the method and location of oral argument.
- (c) A TSOB Review Panel has discretion to structure and establish procedural rules for oral argument via order served on the parties. Such rules may include time limits for argument and the order in which parties present argument.

- (d) Classified information, SSI, or other protected information may not be disclosed during oral argument. A TSOB Review Panel may hold ex parte proceedings to allow for the presentation of classified information, SSI, or other protected information.

§ 126.27 Deliberations and action.

- (a) **Deliberations.** TSOB Review Panel deliberations are closed proceedings. Any materials created by Review Panel members, the TSOB Docket Clerk, and the Review Panel's appointed counsel for use in deliberations are not part of the final administrative record.
- (b) **Action.** A TSOB Review Panel may affirm, modify, or reverse the ALJ's decision. It may also remand the matter to the ALJ with instructions to address particular issues or consider additional testimony or evidence.
 - (1) A TSOB Review Panel requires a simple majority to decide an action.
 - (2) In case of a disagreement among TSOB Review Panel members, a dissenting report may be served with the written explanation of the Review Panel's action. A dissenting report must be prepared in accordance with the requirements for the Review Panel's written explanation.
- (c) **Written explanation.** A TSOB Review Panel will explain its action in writing to the maximum extent permitted by prudent concern for the national security interests of the United States and applicable laws and regulations governing information disclosure. If necessary, the Review Panel may prepare its written explanation in both a protected format (which may contain classified information, SSI, and other protected information) and a non-protected format (which must not contain classified information, SSI, and other protected information). The Review Panel serves non-government parties with the non-protected written explanation and government parties with the protected written explanation. The Review Panel is prohibited from providing the protected written explanation to non-government parties; however, the protected written explanation, if any, is part of the final administrative record that TSA must submit to a U.S. Court of Appeals in the event that a party seeks judicial review of the Review Panel's action.
- (d) **Timing.** A TSOB Review Panel endeavors to resolve an appeal and issue a written explanation of its action to the parties no later than 60 calendar days after the last of the following events:
 - (1) Receipt of a timely filed appellant brief;
 - (2) receipt of a timely filed appellee brief; or
 - (3) Oral argument.

§ 126.29 Effect of TSOB Review Panel action.

- (a) Any person substantially affected by a TSOB Review Panel's action, or the TSA Administrator when he or she decides that the Panel's action will have a significant adverse impact on carrying out 49 U.S.C. subtitle VII, part A, may obtain judicial review in an appropriate U.S. Court of Appeals in accordance with 49 U.S.C. 46110. The Administrators of the FAA and TSA must be made parties to any civil action filed in a U.S. Court of Appeals seeking review of a TSOB Review Panel action.
- (b) If judicial review is not obtained, the action of the TSOB Review Panel is final and binding on the parties for the purpose of resolving the particular decision under review.

§ 126.31 Administration of proceedings.

- (a) A TSOB Review Panel has authority to govern the conduct of its proceedings and internal operations by establishing any additional rules or procedures that are not inconsistent with this part.
- (b) If TSA withdraws its Determination of Security Threat at any time after a notice of appeal has been filed pursuant to § 126.13(a), the proceedings before the TSOB Review Panel are rendered moot and closed. TSA must file a notice of withdrawal of the Determination of Security Threat with the TSOB Docket Clerk within five calendar days of such withdrawal.
- (c) TSOB Review Panel proceedings will generally be closed to the public. A TSOB Review Panel may, in its discretion, open its proceedings to the public. Classified information, SSI, or other protected information shall not be disclosed during administrative proceedings, in accordance with § 126.25(d).