

**U.S. Department of Transportation
Transportation Security Administration
Office of Human Resources Management
Washington, DC 20590**

Date: November 20, 2002

SUBJECT: Interim Policy on Whistleblower Protections for TSA Security Screeners



**FROM: Vicki G. Brooks
Director, Office of Human
Resources Management**

Attached please find our policy on Whistleblower Protections for TSA Security Screeners.

If you have any questions concerning this matter, please contact Paul Sheldon at
(202) 385-12345.

**U.S. DEPARTMENT OF TRANSPORTATION
TRANSPORTATION SECURITY ADMINISTRATION
HUMAN RESOURCES MANAGEMENT POLICY MANUAL**

DATE: November 20, 2002

HRM LETTER NO. 1800-01

SUBJECT: Interim Policy on Whistleblower Protections for TSA Security Screeners

1. Purpose

This directive sets forth procedures for reporting, investigating, and processing whistleblower reprisal allegations raised by Transportation Security Administration security screeners .

2. Authority

Memorandum of Understanding (“MOU”) between the Transportation Security Administration (“TSA”) and the U.S. Office of Special Counsel (“OSC”) dated May 28, 2002, and the Aviation and Transportation Security Act (“ATSA”), Public Law 107-71, § 111(d).

3. Scope

The TSA employees covered by this directive are the TSA security screeners identified at 49 U.S.C. § 44935(e). Also covered by this directive are applicants for TSA security screener positions and former TSA security screeners. These covered parties will be referred to below as “employee(s)” or “security screener(s).”

4. Policy

Taking a personnel action against an employee because of protected whistleblowing is strictly prohibited.

A. Whistleblower Protection Defined

By entering into the MOU with OSC, TSA agreed that it would adhere to a whistleblower protection policy that tracked the provisions of 5 U.S.C. § 2302(b)(8) and that OSC would apply case law used by OSC in processing complaints alleging violations of 5 U.S.C. § 2302(b)(8) in assessing complaints under the MOU.

5 U.S.C. § 2302(b)(8) provides that a federal employee who is authorized to take, direct others to take, recommend or approve any personnel action [as defined in 5 U.S.C. § 2302(a)(2)] may not, with respect to such authority:

- take or fail to take, or threaten to take or fail to take, “a personnel action” with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement, a gross waste of funds, an abuse of authority; or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Disclosures of classified or Sensitive Security Information may be made ONLY to persons authorized to receive such information (which may include authorized employees in the Office of Inspector General or the OSC). Disclosures of classified or Sensitive Security Information to persons unauthorized to receive such information are NOT protected.

5 U.S.C. § 2302(a)(2) as applied to TSA security screeners defines a “personnel action” to mean:

- an appointment;
- a promotion;
- a disciplinary or corrective action;
- a detail, transfer, or reassignment;
- a reinstatement;
- a restoration;
- a reemployment;
- a performance evaluation;
- a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described within 5 U.S.C. § 2302(a)(2);
- a decision to order psychiatric testing or examination; and
- any other significant change in duties, responsibilities, or working conditions.

B. Enforcement

TSA will take corrective and/or disciplinary action, as warranted under the circumstances, where it concurs with an OSC determination that reprisal for protected whistleblowing occurred.

5. Procedures

The procedures for filing complaints of reprisal for protected whistleblowing are set forth at the appendix attached to this directive.

In accordance with the provisions contained in the MOU, OSC will process whistleblower complaints received from TSA security screeners in the same manner it processes all other complaints of prohibited personnel practices, with the exceptions noted below.

A. TSA Case Liaison

TSA has designated a position within the Office of Human Resources Management as TSA Case Liaison for TSA security screener whistleblower complaints. The TSA Case Liaison’s primary role is to coordinate with OSC examiners, investigators and attorneys on whistleblower complaint processing issues.

The TSA Case Liaison is a neutral party to the whistleblower complaint and does not represent any TSA agency official or employee in connection with OSC investigations.

TSA security screener whistleblower complaints may not be initiated with the TSA Case Liaison. While the TSA Case Liaison may be contacted by TSA security screeners for general information, employees are encouraged to visit OSC’s website for the most complete and up-to-date information on whistleblower procedures.

The TSA Case Liaison is authorized to coordinate this Directive’s requirement that TSA employees comply with requests for documents in a timely manner and will also have direct access to TSA officials with authority to resolve whistleblower complaints.

B. OSC Case Processing and Investigation Procedures

Stays. OSC may request that the TSA delay, or “stay,” a personnel action for an initial period of forty-five (45) days, provided the available evidence shows that there are reasonable grounds to believe that a violation of the TSA Directive has occurred. TSA

may refuse to grant a stay. If a stay is granted and the investigation is not complete at the end of the forty-five (45) day period, OSC will discuss the progress with the TSA Case Liaison. TSA has sole discretion to grant or deny a request by OSC for any extension of the initial forty-five (45) day period.

Informal requests for stays will be communicated in the first instance by OSC to the TSA Case Liaison. If the TSA Case Liaison informs OSC that the request for an informal stay has been denied, OSC may then make a formal written request to the Under Secretary or his designee. That official will inform OSC within five (5) days whether the formal stay request will be granted in full, partially granted (i.e., by temporarily assigning the screener to non-screening duties), or denied.

Findings of Violation. OSC will conduct the investigation of TSA security screener whistleblower reprisal complaints. If OSC makes a determination, following an investigation, that there are reasonable grounds to believe there has been a violation under this Directive warranting corrective or disciplinary action, OSC may first attempt to resolve the issues informally. If informal resolution is not possible, OSC will transmit a "Report of Findings and Recommendations" to the Under Secretary of Transportation for Transportation Security that sets forth the facts and legal analysis that supports the determination and any recommendations with respect to appropriate corrective or disciplinary action.

C. Whistleblower Complaint Resolutions

The Under Secretary, or his designee, will respond to the OSC Report on Findings and Recommendations within thirty (30) days, informing OSC what action, if any, TSA will take. This response period may be extended upon agreement of TSA and OSC.

In any case where a whistleblower complaint by a TSA security screener involves alleged reprisal by a TSA official at the level of a Deputy Associate Under Secretary or above, a decision by the Under Secretary not to follow OSC's recommended corrective or disciplinary action in the particular matter will be referred to the Secretary for further consideration.

6. TSA Cooperation with OSC Investigations

TSA employees shall cooperate with OSC investigators in regard to matters under investigation by OSC.

Employees of TSA are required to provide OSC with all information, testimony, documents and material related to any matter under investigation as authorized by the MOU where the disclosure is not otherwise prohibited by law or regulation.

When requested to do so, TSA employees shall provide testimony under oath or affirmation before an OSC official authorized to administer oaths.

TSA employees are performing official duty when testifying or providing evidence pursuant to an OSC investigation.

The TSA will fully and consistently enforce its policies related to cooperation with OSC investigations. Failure by any TSA employee to cooperate may result in disciplinary action.

7. Training on Whistleblower Protections

Materials providing training on whistleblower protections and procedures will be included in the orientation materials distributed to TSA security screeners and TSA security screener supervisors. Any subsequent modifications thereto will also be distributed, in a timely manner, to TSA security screeners and security screener supervisors.

Such training will also advise employees of the OIG and OSC authority to receive and investigate whistleblower disclosures.

- The Office of the Inspector General (“OIG”) of the United States Department of Transportation has authority to receive and investigate whistleblower disclosures made by TSA employees. OIG is under an obligation to maintain the employee's confidentiality in making such disclosures.
- OIG maintains a "hotline" to receive such disclosures by telephone, fax, e-mail, website, and in person. A TSA employee may also make such disclosures to the OIG by regular mail. As part of its intake and processing procedures, OIG informs complainants of their right to contact OSC if the complainant alleges reprisal for making protected disclosures.
- OSC also provides a secure channel through its Disclosure Unit for federal workers to disclose government wrongdoing.
- Where requested by the Secretary of Transportation, OIG may be delegated responsibility for investigating whistleblower disclosures made to OSC and for reporting its findings to OSC.
- At its discretion, OIG may refer whistleblower disclosures to the TSA Office of Inspection for investigation.



Robert W. Gardner
Associate Under Secretary for
Finance and Administration

Appendix

Filing Instructions: File with HRM Letters, Bulletins, and Guidance
Distribution: TSA affiliated HR Offices, Associate Under Secretaries, Program Managers
POC: TSAHR/Paul Sheldon/(202) 385-1234

Title: OSC Whistleblower Complaint Procedures for TSA Security Screeners

Filing a Whistleblower Retaliation Complaint with OSC

All complaints must be submitted on OSC Form 11. (Complaint of Prohibited Personnel Practice or Other Prohibited Activity.) OSC will not process complaints submitted in any format other than a completed Form OSC-11. Form OSC-11 may be printed directly from the OSC web site at www.osc.gov (see [Forms and Publications](#)), or from the TSA security screener link on the OSC web site at www.osc.gov/ppp/tsascreeners. To receive a mailed copy of Form OSC-11, TSA security screeners may contact OSC at (800) 872-9855 or (202) 653-7188.

Note: OSC Form 11 references several prohibited personnel practices and discusses employees' right to file an appeal with the Merit Systems Protection Board (MSPB). Under the MOU, OSC's authority to investigate complaints from TSA security screeners is limited to allegations of whistleblower reprisal. In addition, TSA security screeners do not have the right to file appeals with the MSPB.

OSC requires anyone who seeks an investigation of a complaint alleging reprisal for whistleblowing to select one of three consent statements (Form OSC-49). This consent form is part of OSC Form 11 and must be completed before OSC will proceed with an investigation.

The section of OSC Form 11 that requests information about the nature and timing of the disclosures and the alleged retaliatory personnel actions must be completed before OSC will review the complaint. Completed OSC complaint forms should be sent to:

U.S. Office of Special Counsel
Complaints Examining Unit
1730 M Street, NW, Suite 201
Washington, DC 20036-4505.

OSC has a policy of open communication with complainants. OSC provides complainants with the names and telephone numbers of the OSC staff members assigned to their complaints. In addition, the assigned Examiner, Investigator or Attorney sends a status report on the complaint 90 days after the acknowledgement letter and every 60 days thereafter while the matter is active.

OSC Procedures for Handling Complaints

Complaints Examining Unit (CEU). CEU receives complaints filed with OSC and initially analyzes each allegation. Within 15 days of receipt of a complaint, CEU sends a letter to the complainant acknowledging receipt of the complaint and identifying the CEU Examiner assigned to handle the complaint. When necessary, the CEU Examiner contacts complainant for additional information to ensure that CEU clearly understands the nature of and basis for each allegation. CEU conducts further inquiry to the extent necessary to determine whether the allegation warrants additional investigation.

After the CEU examination of the complaint is complete, OSC makes a determination either to close the complaint, or if the complaint states a potentially valid claim, to refer it to one of OSC's Investigation and Prosecution Divisions (IPD) for additional investigation and legal analysis. If the complaint is referred to IPD, CEU sends a letter to the complainant informing her or him of this action, and encloses information about the IPD process.

If CEU has concluded that the complaint should be closed, the Examiner sends the complainant a preliminary determination letter that sets forth the reasons to close the file on the complaint. The

complainant has an opportunity to respond to this preliminary determination within 16 days, and to offer additional information or arguments in support of his or her allegations. OSC will consider any response before making a final decision on the complaint.

Alternative Dispute Resolution (ADR) Unit. OSC offers mediation in selected cases that have been referred for investigation. Participation in the OSC mediation program is completely voluntary for both the complainant and TSA. If both parties agree to mediate their dispute, an OSC mediator will facilitate a discussion between the parties to reach a mutually agreeable resolution to the complaint. For more information on mediation at OSC, click on the Alternative Dispute Resolution link on OSC's web site, or ask OSC for a copy of its brochure on ADR.

Investigation and Prosecution Division (IPD). IPD staff conducts investigations to review pertinent records, and interview complainants and witnesses with knowledge of the matters alleged. Matters that are not resolved during the investigative phase undergo legal review and analysis to determine whether the IPD inquiry has established that there are reasonable grounds to believe that retaliation has occurred, and whether the matter warrants corrective action, disciplinary action, or both.

Stays of a Personnel Action Pending Investigation of the Matter. Complainants may request that OSC seek to delay, or "stay," an adverse personnel action pending an OSC investigation. If the available evidence shows that there are reasonable grounds to believe that retaliation has occurred, OSC may ask the TSA Case Liaison to delay the personnel action. If the Case Liaison does not agree to a delay, OSC may then make a formal written request to the Under Secretary of Transportation for Security. (OSC cannot stay a personnel action on its own authority.)

Corrective Action. OSC may enter into discussions with TSA at any stage of a pending matter in pursuit of a resolution acceptable to all parties. Generally, corrective action is intended to place the employee back into the position the employee would have been in had the alleged retaliation not occurred. Corrective actions may include expunging a letter of reprimand, reversing a suspension or other adverse actions, job restoration, and reimbursement of costs for damages incurred as a result of the retaliatory personnel action. Damages for emotional distress, i.e., pain and suffering, are not recoverable.

If OSC determines that corrective action is warranted, the investigator or attorney contacts the complainant and the TSA to discuss settlement of the complaint. Occasionally it is not possible to restore the complainant to exactly the same position he or she would have been in if the retaliation had not occurred, or the complainant may not want to be placed in that position. In such cases, OSC attempts to negotiate a resolution acceptable to both the complainant and TSA.

In some cases, where OSC determines that the retaliation was particularly harmful or willful, OSC may make a disciplinary action recommendation against the retaliating official to the Under Secretary of Transportation for Transportation Security.