

## Transportation Security Administration and Transportation Security Officers (TSOs)

*"It always seems impossible until it's done."*

**Nelson Mandela**

Over 40,000 Transportation Security Officers (TSOs) screen passengers and baggage at our nation's airports, mass transit, and large public gatherings such as Presidential inaugurations and the Super Bowl. In 2013, TSOs experienced shared challenges with the federal workforce and unique challenges resulting from the irrational management rights clause included in the Aviation Transportation Security Act (ATSA) and exploited by the Transportation Security Administration (TSA) management. This mere statutory footnote has been interpreted by courts and administrative bodies as giving the TSA Administrator the authority to pick and choose whether, and how, Title 5 federal worker rights and protections apply to TSOs. The ATSA footnote has no relationship to defending America against those seeking to do us harm. As implemented by TSA, the denial of Title 5 rights and protections to TSOs, and continued attempts to frustrate TSO union rights, only serve to make TSA operate dysfunctionally. It is for that reason that no other federal agency – including intelligence agencies – has adopted the restrictive regime of TSA management. AFGE will continue the fight for rights and respect for TSOs and the important work that they do. Our goal is not impossible. We will achieve it.

### ***Union Progress***

The first full year of implementation of the collective bargaining agreement ratified by TSOs demonstrated the tangible benefits of solidarity and exclusive representation. Three-fourths of the TSO workforce received a bonus and pay raise under the new pay system. Congressional lobbying resulted in a new law requiring TSA to maintain responsibility for monitoring lanes and saved at least 1,400 TSO jobs. AFGE fought to save the jobs of Behavior Detection Officers when the Screening of Passengers by Observation Techniques Program was threatened. Transfers, shift, and leave bid policies at TSA began to mirror established policies at other federal agencies. AFGE is an integral part of a team working in partnership with TSA to improve airport safety and protect TSOs on the job. AFGE has beat the odds to improve the worklife of TSOs and we will aggressively continue the fight in the upcoming year.

### ***Title 5 Rights***

AFGE's victory in negotiating a historic first contract with TSA under the 2011 Administrative Directive granting *limited* collective bargaining, representation and appeal rights to TSOs nonetheless retained an unsustainable, separate and unequal personnel system for 41,000 federal employees. Despite the 2011 Directive, TSOs are limited in areas subject to collective bargaining, access to the Merit Systems Protection Board (MSPB) to appeal adverse actions,

application of long-accepted worker protection laws such as the Family and Medical Leave Act, the Fair Labor Standards Act, and Office of Personnel Management (OPM) pay and leave guidelines. Application of Title 5 rights and protections to workers has done nothing to preclude the ability of other agencies at DHS to carry out their important duties of protecting the U.S. public, and those agencies are not subject to the consistently low scores TSOs give TSA on employee morale and worker satisfaction surveys. There is no correlation between the mistreatment of the majority of the TSA workforce and good governance. If there was some advantage to denying workplace rights and protections to workers, TSA employees who are not TSOs would not enjoy the rights denied to the TSO workforce.

TSA has created a system for resolving employee disputes that is almost entirely left to the agency's sole discretion. The National Resolution Center (an internal TSA management-created entity that exists in no other agency) determines which matters are grievable and attempts to restrict what matters can be brought before a neutral third party for review. Currently TSOs lack the meaningful ability to appeal adverse personnel decisions to the MSPB, a right Congress granted to almost every other federal employee. TSA has attempted to limit this fundamental right of due process by requiring the MSPB to submit its decisions to TSA Administrator John Pistole for his concurrence. As a result, MSPB, an independent agency, has rightly refused to hear cases that can be overturned by the head of the agency. The MSPB had the integrity to reject TSA's end-run around the agency's authority and autonomy. AFGE will work for legislation that repeals the ATSA footnote setting TSOs apart from other workers at TSA and demands that TSA's tenure as an outlier federal agency come to an end. TSA must follow the same laws, regulations, and guidance regarding its workforce as other agencies in DHS. Absent such action by Congress, AFGE calls upon President Obama to use his executive authority to apply Title 5 rights and protections to TSOs.

### ***TSA Denies a Fundamental Civil Right to TSOs***

TSA continues to violate the letter and spirit of the Rehabilitation Act and the Americans with Disabilities Act. TSA's website specifically states that TSA employees or applicants "may raise" disability or the other prohibited forms of discrimination in the Equal Employment Opportunity (EEO) complaint process. The TSA website fails to mention that the agency will remove itself from enforcement of EEO rights, especially if the agency is likely to be held liable for discriminatory acts. TSA routinely refuses to provide reasonable accommodations for TSOs with disabilities. TSOs who are capable of continued employment are often placed on leave and subsequently terminated for inability to perform their duties or inability to work a regular schedule. The Equal Employment Opportunity Commission (EEOC) has found the TSA's actions to violate the Rehabilitation Act and the Americans with Disabilities Act. The EEOC has found TSA's use of a document entitled *Medical and Psychological Guidelines for Transportation Security Screeners (Guidelines)* to determine whether a TSO can perform what the agency states are the "statutory requirements" for a screener to be in violation of the law. The mere diagnosis of a condition such as an arrhythmia or diabetes and the use of Family and Medical Leave Act provisions apparently trigger evaluation under the *Guidelines*, not whether there is any evidence that the condition prevents a TSO from performing their duties. TSA continues to

disqualify TSOs from their jobs based on the *Guidelines* and also refuses to provide a current copy of the document to AFGE despite numerous requests. No other federal agency applies this criteria to its workforce. These are hardly the actions of an agency dedicated to a fair workplace where employees are treated equally.

TSA has consistently demonstrated its willingness to exempt itself from laws and regulations providing protection and rights to federal workers because of the ATSA footnote. AFGE calls on President Obama through Executive Order and Congress through legislation to make clear their intent that TSOs are protected by Title 5 worker protections, all civil rights laws and the guidelines and regulations of OPM.

### ***TOPS: THE PAY-FOR-PERFORMANCE SYSTEM THAT DOESN'T PAY OR PERFORM***

During negotiations with TSA management and the union's ten year campaign to represent TSOs, AFGE repeatedly informed management representatives that development of the details of the new Transportation Officer Performance System (TOPS) would require extensive discussion and collaboration between management and the union. Despite agreements for discussion and collaboration, TSA management prematurely released details of the TOPS program without any input from AFGE. The refusal to consult AFGE is more than a broken promise; it is evidence of the lack of good faith on the part of TSA. The reasonable request of TSOs is that they are adequately compensated by a pay-for-performance system that will provide a fair chance that TSOs will actually be paid for the work they perform. TOPS does not deliver on this expectation.

Although three in four TSOs received a bonus and raise in the first TOPS payout, AFGE wonders if those results would have been greater with a more realistic and fair system. AFGE filed a grievance over TSA's unilateral implementation of the TOPS program and failure to engage in collaborative discussions with the union. The TOPS standards are not specific, measurable, achievable, realistic, and time-bound. TSOs were evaluated on duties they not only do not perform, but also duties that are specific to different positions in a higher payband. As a consequence, these officers could not possibly meet the standards TSA created for TOPS. An officer can still be negatively impacted by one instance of failure to meet a standard during an entire year of work. TSOs were evaluated by managers who were improperly trained and failed to apply the standards correctly. Managers incorrectly told TSOs dissatisfied with their evaluations there would be no payout in 2013. As a result some TSOs who believed they were evaluated unfairly failed to grieve their evaluations in a timely manner because of management misrepresentations. On the surface, a majority of TSOs did receive a bonus and a raise under TOPS, but a deeper assessment of TOPS strongly indicates an illogical and unfair system that robbed many TSOs of the rating and pay they should have received.

AFGE will pursue the grievance of TOPS to arbitration and represent TSOs who have grieved their final ratings. These adversarial actions could have been avoided if TSA respected the collective bargaining agreement and consulted AFGE during the formulation of the system. TOPS does not address the inadequate pay that has dogged the agency since its inception. At a

January 2014 hearing before the House Oversight and Government Reform Committee, TSA Assistant Administrator for Security Operations Kelly Hoggan acknowledged that being a TSO is not an easy job and that “TSOs are some of the lowest paid employees in the government.” AFGE calls on TSA to do more than pay lip service to the unconscionably low wages of TSOs. Instead, the agency should work with AFGE to increase TSO pay and institute a fair evaluation system.

### ***Attempts to Privatize the Screening Function by Some in Congress***

Following the tragic events of 9/11, Congress and the public demanded that jobs of screening passengers and baggage be performed by federal employees. A group of lawmakers successfully exempted the screening function at a few airports from being federalized and the Screening Partnership Program (SPP) was born as a pilot and experimental program. But some lawmakers and their business allies did not stop their opposition to federalization. They have been expanding the program from the original five airports to 16. The program was a consolation prize to private contractors after their past appalling performance in aviation screening led to the federalization of those jobs in the first place.

TSA Administrator John Pistole suspended the SPP in January 2011 after concluding that private screeners were more expensive and did not provide equivalent security when compared to federalized TSOs. Representing the financial interests of security contractors such as Covenant and Trinity instead of the security interests of the flying public, former House Transportation Committee Chairman John Mica (R-FL) insisted on holding up the important Federal Aviation Administration Modernization Act until his provisions making privatization easier were included. In addition to limiting the TSA Administrator’s authority to disapprove SPP applications, the provisions even allowed foreign companies to apply to perform screening at U.S. airports.

However, what Representative Mica and security contractors failed to account for was the dedication of TSOs to retain their jobs as employees of TSA working as part of the federal team to protect the flying public. On January 8, 2013, the Sacramento County Council reversed its decision to apply for private screeners under the SPP program. Members of the Sacramento County Council responded to facts provided by a recent Government Accountability Office report that concluded TSA has insufficient evidence to support that private screeners are more effective or cheaper than federal TSOs, and expressed concerns that TSOs might lose their jobs if a private contractor was in charge at the airport. Members of AFGE Local 556 at Orlando International Airport (MCO) have worked very hard to prevent Representative Mica from taking their jobs and handing them to private screeners. Despite TSOs at the airport ranking 7<sup>th</sup> in the nation in confiscated firearms in 2013 (83% of which were loaded) and receiving high satisfaction ratings from 93% of 1100 passengers surveyed in a 2010-2011 Valencia College poll, Representative Mica has advocated that screening at the airport be disrupted and handed over to a for-profit private screening company. AFGE stands with the TSOs at MCO and will continue to provide local officials with the facts about SPP to prevent expansion of this program. As in other personnel matters, TSA should follow the same laws and regulations that

apply to other federal agencies. AFGÉ will work with members of Congress to introduce legislation that will apply the same contracting out rules to TSA and the SPP as followed by the rest of the federal government.

AFGE strongly supports H.R. 1455, the Contract Screener Reform and Accountability Act introduced by TSO and worker rights advocate Representative Bennie Thompson (D-MS), ranking member of the House Homeland Security Committee. H.R. 1455 is a common sense bill that finally applies transparency and accountability to private screening companies seeking a fast buck off aviation security. The bill prohibits subsidiaries of foreign-owned corporations from obtaining SPP contracts; requires that security breaches at airports with private screening services be reported; requires training for the proper handling of sensitive security information at SPP airports; mandates covert testing of contract screeners and imposes penalties for cheating; and enhances customer service at SPP airports. These are the basic minimum standards of operation and accountability that private screening contracts should meet. AFGÉ strongly supports the Contract Screener Reform and Accountability Act and will work for introduction of companion legislation in the Senate.

### ***TSO RESPECT, VIOLENCE PREVENTION, AND HEALTH AND SAFETY ISSUES***

#### ***Disrespect Inevitably Leads to Violence***

Tragically on November 1, 2013, an active shooter at Los Angeles International Airport (LAX) murdered TSO Gerardo Hernandez, the first TSO to die in the line of duty. Two other TSOs were injured in the same attack. The potential for checkpoint carnage aimed at the TSOs on duty that day was immeasurable. The shooter was indicted on federal charges including murder of a federal employee, but he was not charged with violation of 49 U.S.C. §46502, which establishes assault with a dangerous weapon on security workers at an airport as punishable with a sentence of up to life imprisonment. This omission was yet another indication of a failure to appreciate the skill, commitment to duty, and courage of our nation's 41,000 TSOs.

Despite being the frontline workforce that has prevented acts of aviation terrorism on flights originating from U.S. airports since its creation, TSOs have been singled out as targets of disdain by a few members of Congress who would deny them badges, uniforms and even the title of officer. Perhaps encouraged by this blatant disrespect, a small but active group of passengers often blows the slightest irregularity out of proportion, which in turn is repeated by the media. TSOs are not the authors of the rules they enforce, but face discipline, up to termination, if they do not enforce those rules. TSOs working at airport checkpoints report being pushed, hit, and spit upon, and routinely have items yanked from them by passengers with such force that the officers lose their balance. A first step toward preventing acts of aggression against TSOs is to encourage the public to treat them with respect. Every member of the flying public should know that it is absolutely unacceptable, not to mention a violation of federal law, to assault a TSO.

TSA must also take steps to better protect the TSO workforce. Although TSOs are required to report checkpoint assaults to management, it is not clear what occurs from that point. There are reports that managers have refused to detain passengers who have assaulted TSOs, and at times TSOs who were the victims of assaults are blamed for the incident. TSOs are unarmed, do not have apprehension authority or even the authority to call airport local police if there is an assault. As was sadly learned as a result of the LAX shooting, delays in summoning and the response time of airport local police may result in loss of life and injury. AFGE strongly supports the creation of an armed federal law enforcement TSO position to guard the checkpoint and our nation's airports.

### ***Why Won't TSA Agree that TSOs Should Wear Dosimeters?***

AFGE raised the radiation issue with TSA in early 2010 and urged all officers to file with TSA a CA-2 workers' compensation claim to document their exposure to ionizing radiation after AFGE received numerous reports from employees alarmed by what appeared to be a large number of TSOs being diagnosed with cancer and thyroid conditions in Boston and other locations. TSA maintained that the X-ray machines were safe and repeatedly denied AFGE's requests for dosimeters and our offer to purchase them for officers. AFGE took the issue to Capitol Hill, and testified before Congress calling for a radiation safety and monitoring program at the agency. TSA announced that it would retest every one of its 247 full-body X-ray scanners at 38 airports after maintenance records on some of the devices showed that X-ray machines emit ionizing radiation 10 times higher than previously reported.

In an article from the premier science publication, *Scientific American*, two quotes from respected scientists say it all: "I wouldn't dream of not having [dosimeters] already," said Dr. Nagy Elsayyad, of the University of Miami School of Medicine. "By any definition they are radiation workers," said David Brenner, director of the Center for Radiological Research at Columbia. AFGE will continue to press Congress for legislation that would require TSA to allow TSOs to wear dosimeters and be responsible for the collection, testing and reporting of the results.

### ***Representation Rights***

TSA managers continue to pursue avenues to thwart the right of union members to effective representation on the job. Despite the Pistole Determination's provisions that union representatives are entitled to "reasonable amounts of official time", TSA management consistently limits or denies official time requests in violation of the Determination, the collective bargaining agreement, and TSA policy directives. Managers substitute their judgment for the amount of official time necessary to represent employees in a manner that always reduces the representation an employee may receive. AFGE demands that TSA stop interfering with the fundamental right of union representation and stop displacing the judgment of worker representatives with their own narrow and incorrect "understanding."

## ***Conclusion***

AFGE and its TSA members continue progress towards fundamental workplace rights wrongfully denied the workforce. In 2014 AFGE expects to make even greater strides to ensuring those fundamental workplace rights apply to TSOs as a matter of law and policy. AFGE will continue to take the case for TSO rights to both President Obama and Congress during 2014.