



**Transportation
Security
Administration**

DECISION MEMORANDUM

Determination

Transportation Security Officers and Collective Bargaining

Introduction

The failed Christmas Day terrorist attack just over a year ago and the recent air cargo plot reminded us all of the challenges we face in protecting our nation against a creative and determined enemy. The Transportation Security Administration's mission to protect transportation security systems is critical to our national interests. While we continue to step up to the challenges of this mission, I am engaged in a full examination of how we can continue to evolve towards an agile, high performance organization that is better able to protect the traveling public from constantly changing threats.

As part of my top-to-bottom review of TSA, and in line with a commitment I made during the Senate confirmation process, I have conducted a full assessment of the impact union representation and collective bargaining might have on TSA's counterterrorism mission. I have also considered the recent decision under the Federal Service Labor-Management Relations Statute (5 U.S.C. Chapter 71) issued by the Federal Labor Relations Authority (FLRA or Authority) – an independent government agency that oversees federal labor relations – directing an election about exclusive representation for purposes other than collective bargaining (65 FLRA No. 53 (2010)). The determination that follows outlines my decision regarding collective bargaining in the context of my ongoing assessment of TSA's operations and how to best achieve our critical security mission.

Background

Under the legislation that created TSA, the Aviation and Transportation Security Act (ATSA), Pub. L. 107-71 (November 19, 2001), Congress gave TSA's Administrator the authority to set TSO personnel rules "notwithstanding any other provision of law." (See Section 111(d) of ATSA, 49 U.S.C. § 44935 note.) This means the Administrator has very broad authority to establish terms and conditions of employment for TSOs.

On January 8, 2003, former TSA Administrator James M. Loy used this authority to issue a determination concerning TSOs and collective bargaining. Administrator Loy concluded, at that early stage of TSA's journey, that TSA's security mission required that TSOs not be allowed to

engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative. Today I modify Administrator Loy's determination by providing for an election concerning representation and, if a union is elected, for carefully defined limited exclusive union representation under conditions and within a framework unique to TSA that does not adversely impact the resources and agility necessary to protect the security of the traveling public.

Basis and Criteria for this Determination

TSA has come a long way since its founding and early days and I commend TSA's employees for their hard work, the immense progress they have made, and their commitment to TSA's mission. Our commitment cannot waiver as new threats continue to emerge, security practices continue to evolve, and we continue to improve our security practices. We can and will continue to recognize significant gains in performance and progress toward realizing TSA's full potential to identify and prevent threats to the United States transportation system.

There will always be room for improvement in threat detection. Our frontline workforce must be better trained and better prepared, as well as better equipped, to provide intelligence-based, multilayered security in all of the transportation sectors for which we are responsible. Yet data from employee surveys has repeatedly shown TSA ranking poorly in terms of employee morale and engagement. Employee engagement and security are interrelated, and therefore directly affect our capacity to effectively carry out our mission. We must assure that our TSOs are motivated and engaged as their judgment and discretionary effort are critical to achieving superior security. We must and will continue to do better with and by our employees to ensure we continue to accomplish our mission.

My experience with the Federal Bureau of Investigation has convinced me that an organization excels when it invests in its employees by building their skills and professionalism, providing working conditions and a work climate that fosters the engagement of each and every employee, and by building an organization that truly values and promotes initiative, knowledge and information sharing, coordination, teamwork, and collaboration. The principles that apply to the FBI apply to TSA as well. In my view, implementing this wisdom is not a choice but a necessity. TSA must, in every location, in every mission component, and at every level, consistently adopt and demonstrate these qualities and practices if we are to continue to build the high performance organization that the public deserves and our nation requires.

As I promised in my confirmation hearings this past summer, I have given careful thought to the question of union representation for TSOs. I have looked at workforce data, sought out the experience of others in the security and law enforcement fields, and listened to many views in the context of considering TSA's mission requirements, now and in the future, and the security and confidence of the traveling public. I have listened to what TSOs have told me in Town Halls, in the many emails I received from them, in National Advisory Council meetings and phone calls and from the IdeaFactory. I have talked to Federal Security Directors and field management and have met with the presidents of the two unions currently seeking to represent TSOs

exclusively. I have reviewed the November 12, 2010 FLRA decision directing a union election for unspecified matters that did not include collective bargaining. I have considered all of the above and its potential impact on our employees, and on transportation security.

Based on this broad review and after much consideration, I have reached a number of preliminary conclusions. As an initial matter, I recognize that as a new agency with an evolving understanding of how best to achieve its mission, TSA has some unique challenges. It cannot stay locked into the lessons of the past or the practices of today if it is to anticipate and identify the threats of tomorrow. A one-size-fits-all model of labor relations that undermines initiative and flexibility would not serve TSA or its workforce well.

In making this decision I am further mindful that TSA does not have the labor relations infrastructure that exists in other agencies with nationwide bargaining units to support and manage day-to-day labor relations. Creating such an extensive infrastructure would be time consuming and resource intensive. More significantly, I have become very aware of the potential for distraction and discord that could extend for months or years were there to be a potentially divisive union election possibly followed by protracted litigation and additional proceedings. Similarly, I have come to understand that extended, unproductive adversarial processes and practices can, in the federal system, accompany bargaining at the national and local level even when all parties are acting in good faith. TSA cannot afford to have either attention or resources diverted from its mission, beyond what is necessary to serve that mission by promoting employee morale and vigilance. Nor can TSA tolerate delay or extended litigation after the fact concerning a union election or, should an exclusive representative be elected, over implementation of changes necessary to respond to new intelligence or new insights on how best to use our resources in service of our mission.

By the same token, I am aware that although Administrator Loy's determination of 2003 precluded collective bargaining for TSOs, union activity among TSOs has been ongoing. Although TSA has not recognized any union as the TSOs' collective representative, over 13,000 TSOs are paying dues through payroll allotments to one or the other of the two unions seeking to represent TSOs. While union activities are restricted to non-work time, the issues around union representation continue to involve and divide the workforce. An election at this time would give all TSOs a fair and transparent process in which to express their preference and resolve the issue of union representation for the foreseeable future.

Further, my assessment convinces me that if the TSOs choose through an election to have an exclusive representative, both TSOs and TSA could benefit from some aspects of union representation provided that union representation is recognized within a framework that protects TSA's security mission. In this regard, it is critical that every TSA employee feels that he or she has a voice and feels safe raising issues and concerns of all kinds. This is important not just for morale; engagement of every employee is critically important for security. TSA must at all times have the benefit of the broadest input from the employees who are at the frontlines of security, day in and day out. Yet, although TSA has in place a number of tools, processes, and mechanisms through which employees can raise both individual and group

concerns, and has prohibited retaliation for using those resources, implementation of these directives has been inconsistent across TSA.

While much of the discussion throughout TSA's history has focused on potential problems that might arise from collective bargaining, it is also true that unions can play a constructive role. They can help develop solutions for some systemic issues, bring local concerns to national attention when existing mechanisms prove inadequate to the task, bring forth the concerns of employees who choose to have them do so and serve as an advocate for those employees who choose not to advance their concerns themselves. Such representation can help support our workforce and ensure consistency and accountability within our far flung operation across nearly 450 airports. Although the enhanced engagement of individual employees is not inevitably the outcome of union representation, it can be and must be at TSA. We can, must, and will continue to move forward with initiatives that develop employee professionalism and engagement either in concert with a union representative if that is the employees' choice, or without one should neither union win a majority of the employees' votes.

I want to stress that my recognition that an exclusive representative could and in fact must play a constructive role if it becomes the exclusive representative of TSOs is not intended to influence the TSOs' vote in a union election either for or against union representation. The decision to elect or not elect a union as exclusive representative should and does belong to the TSOs who will vote in the election. I will respect their choice, and TSA will continue to protect the American people by engaging our workforce whatever the outcome of the election.

I am therefore exercising my discretion to allow TSOs to vote in an election under specific conditions that protect security and the resources necessary for security, and do not lead to protracted litigation. Among those conditions is a clear understanding of the purpose of the election on the part of the voting employees, the unions, and TSA management. This is particularly critical because the FLRA decision did not clearly define the unique form of representation for purposes other than collective bargaining that would result from an election under the provisions of the Federal Service Labor-Management Relations Statute (5 U.S.C. Chapter 71). To our knowledge, such an election has never been conducted by the Authority. The FLRA recognized the "complex legal issues" arising should a union win an election in which the rights and obligations of both the union and TSA management are not clearly defined but left the resolution of such issues to a later time. The lack of clarity of purpose will, as the FLRA suggests, most likely lead to ongoing, complex disputes regarding the rights of employees and any union that employees may elect. I have determined such ongoing turmoil poses an unacceptable risk to security.

Therefore, it is my duty to articulate the conditions under which an election can be conducted and union representation provided, consistent with the security of the traveling public, and to provide detail sufficient to illuminate the rights and responsibilities of all concerned. For the reasons set forth above and pursuant to my authority under ATSA § 111(d), I have concluded that an election for the purposes set forth in this Determination can be conducted consistent with TSA's mission and the security of the traveling public if that election is conducted under

the conditions also set forth in this Determination. Further, pursuant to my authority under ATSA § 111(d), I set forth below a comprehensive structure that is different and distinct, separate and independent, from that provided in 5 U.S.C. Chapter 71, but that will provide for genuine, binding collective bargaining on specified subjects at the national level with the union, if any, that prevails in an election process conducted among the TSOs. This representational framework will be structured so TSA and TSOs can enjoy the benefits of union representation without jeopardizing TSA's ongoing ability to achieve the high performance mandated by our mission.

The criteria that have shaped and form the requirements of the labor management framework I commit to in this Determination pursuant to my authority under ATSA § 111(d) are:

- The framework must provide for the broadest possible participation and involvement by the entire workforce.
- The framework must honor the need of every employee to be valued and to have a voice, the desire of some employees for an advocate, and the freedom of each employee to choose if and how to give voice to their ideas and concerns.
- All covered employees will have the right, without restraint or coercion, to join and support any union of their choosing and to refrain from joining or supporting any union or paying dues or agency fees.
- The resources and attention required by this labor relations framework must be commensurate with its benefit to TSA's mission.
- The framework must enable TSA to be agile, to swiftly change security procedures, practices, and technology when intelligence indicates, and as TSA's approach to security evolves and improves, without costly and distracting adversarial proceedings before or after the fact.
- Labor management relations must be results oriented, designed to solve problems and resolve issues rather than defer resolution through resorting to lengthy, multiple, adversarial avenues.
- Procedures for resolving disagreements must be efficient, fair, and transparent and include checks and balances.
- The election process to be conducted by the FLRA, including both the pre-election period and the post-election process for resolving any challenges and objections, must be concluded, with finality, with deliberate speed as consistent with fundamental fairness and as necessary to avoid any impairment of TSA's or its TSOs' focus on security. Post-election objections and challenges will be resolved consistent with this

Determination and, to the extent that FLRA precedent and the Determination are not consistent, this Determination will control.

- If covered employees select an exclusive representative through an FLRA-conducted election process, collective bargaining may commence as set forth in this Determination. TSA will not bargain about security policies and procedures or issues affecting security. Bargaining shall be interest-based, with any disputes arising from either the bargaining process or the application of a binding collective bargaining agreement resolved expeditiously and fairly under the processes described in this Determination.
- TSA must continue to institutionalize the culture of collaboration and employee engagement that is critical to its mission, and these values and the ability to deploy them in support of an agile, high performing organization can and must be enhanced as the foundation of any labor-management relationship.
- Consistent with the public good and the provisions of ATSA, no employee or union may participate in a strike or assert the right to strike. This prohibition applies to work slowdowns, concerted call-outs, and any other conduct viewed as a collective job action.

Essential Components of this Determination

I. Legal authority for Determination:

- A. I have determined that an election conducted by the FLRA under the principles and conditions set forth in this Determination, for the purposes described in this Determination, does not pose an actual conflict between my statutory authority over unit employees' terms and conditions of employment under § 111(d) of ATSA (49 U.S.C. § 44935 note). I have further determined that ATSA § 111(d) supersedes the Federal Services Labor-Management Relations statute (5 U.S.C. Chapter 71) in all other respects and therefore Chapter 71 shall not apply, or afford any rights, to management, unions, or covered employees that are not expressly provided in this Determination.
- B. I have further determined, in the exercise of my discretion under ATSA § 111(d), to establish an integrated labor-management framework built on principles of interest-based, collaborative, and binding collective bargaining accompanied by a resolution process including both interest-based and rights-based options that creates solutions that are fair, transparent, and timely. Inasmuch as exclusive union representation and collective bargaining would be new to TSA, adjustments to this system can and should be made in light of our experience with it. My intent is that this framework will continue to evolve and improve through an ongoing collaborative process, consistent with the principles set forth within this Determination.

- C. To the extent that any existing policies or TSA Management Directives are inconsistent with this Determination with regard to covered employees, they are amended or superseded by this Determination. Changes to written policies and directives will be codified as relevant provisions of this Determination become applicable.

II. Covered employees:

- A. Employees included in the national unit for an election for the purposes of exclusive representation, also referred to as “covered employees” or “unit employees,” are the following full- and part-time non-supervisory personnel carrying out screening functions under 49 U.S.C. § 44901, as that term is used in ATSA § 111(d):
 - 1. Transportation Security Officers;
 - 2. Lead Transportation Security Officers;
 - 3. Master Transportation Security Officers (which include Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians); and
 - 4. Expert Transportation Security Officers (which include Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians).
- B. Employees who otherwise would be covered by this Determination will be excluded if: they are supervisors or part of management; confidential employees; perform personnel work in other than a purely clerical capacity; or engage in intelligence work, provided that merely possessing a security clearance and having occasional access to classified information will not be deemed as engaged in intelligence work. For purposes of this Determination, confidential employees will include any employee whose job duties include acting in a confidential capacity with respect to a supervisor or management official who formulates or effectuates management policies in employment or labor relations matters.
- C. All covered employees are free to join or support any union without fear of coercion or retaliation. No covered employee is or may be required to join a union or pay dues or similar remittances to a union if they are not members of that union.

III. Scope of representation and coverage:

- A. Representation for purposes other than collective bargaining after the election process is concluded:

For purposes of personal representation in resolution processes provided in this Determination or under TSA Management Directives authorizing personal

representation, any unit employee may designate a personal representative without fear of coercion or retaliation. Personal representatives selected by unit employees need not be union representatives and the union is not obligated to provide personal representation for employees who are not union members. However, if a union is certified by the FLRA as the exclusive representative, unit employees may not select any other union to represent them. Personal representatives, if not TSA employees, will be required to sign a Sensitive Security Information (SSI) non-disclosure agreement and to comply with the security requirements at airports and other TSA work locations.

B. Representation for purposes of collective bargaining:

1. General requirements:

- a. Collective bargaining under this Determination will be conducted using interest-based processes and consistent with the principles of interest-based negotiations.
- b. Any collective bargaining agreement will be binding on TSA, the union, and all covered employees if approved by referendum held among all unit employees under § III(B)(1)(e) below.
- c. The collective bargaining agreement will be national in scope and will cover all unit employees.
- d. Collective bargaining shall occur only at the national level; local level bargaining and local level agreements are prohibited.
- e. Referendum on collective bargaining agreement:
 - i. A collective bargaining agreement negotiated between TSA and an exclusive collective bargaining representative will be binding on the parties and unit employees after it has been presented to unit employees, voted on in a referendum among all unit employees, and affirmatively supported by a majority of unit employees voting in the referendum. The referendum will be conducted electronically by TSA and will provide unit employees with the opportunity to vote on the collective bargaining agreement and, if the vote is not to support the collective bargaining agreement, to provide information on which provisions were not supported and why. TSA will promptly provide the results of the referendum and any information gathered through it to the exclusive collective bargaining representative.
 - ii. If the collective bargaining agreement is not approved, TSA and the exclusive collective bargaining representative will recommence negotiations during the

45 calendar day period beginning on the day that the result of voting in the referendum is announced. If a revised collective bargaining agreement is agreed upon during this period, it will be submitted to all unit employees for an up or down vote. If a majority of unit employees voting support the revised collective bargaining agreement, that agreement will be binding on the parties and unit employees. If a majority of unit employees do not affirmatively support the revised collective bargaining agreement, TSA and the union will collaboratively decide on next steps in the bargaining process. If a collective bargaining agreement approved by a majority of voting unit employees is not in place, TSA will continue to manage unit employees' terms and conditions of employment and the exclusive representative will provide representation for purposes provided under this Determination.

2. Issues subject to collective bargaining: The establishment, determination, or adjustment of the following matters shall be subject to collective bargaining:
 - a. The performance management process to the extent not otherwise excluded under § III.B.3. below;
 - b. Awards and recognition process;
 - c. Attendance management process;
 - d. Shift and annual leave bid process (excluding shift start times and types of shifts, numbers, days off, and guarantee of consecutive weeks);
 - e. Shift trade policy;
 - f. Transfer policy;
 - g. Process for work status change from full time to part time and vice versa;
 - h. Uniforms and uniform allowances not including relevant security requirements;
 - i. Selection process for special assignments;
 - j. Parking subsidies; and
 - k. Facilities and services within the control of TSA management.
3. Issues excluded from collective bargaining: The establishment, determination, or adjustment of the following matters concerning covered employees shall be decided by TSA's Administrator and neither these matters nor the impact and implementation of decisions concerning them shall be subject to collective

bargaining or grievable. Moreover, the matters listed below shall have the broadest possible interpretation as to scope, meaning, and interpretation:

- a. Pay and policies affecting pay, including without limitation pay upon appointment, promotion, reassignment, demotion, or based on any other consideration or personnel action;
 - b. Security policies and procedures, including without limitation standard operating procedures, directives, instructions, training, and means and methods of implementing such procedures;
 - c. Deployment of security personnel;
 - d. Deployment of equipment and technology, including without limitation source selection, investigation, testing, modification, selection, and maintenance;
 - e. Job descriptions, qualifications, fitness for duty standards, performance standards and staffing, numbers, and types of employees (including covered employees);
 - f. Annual certification requirements, testing, and consequences of failure to certify or recertify;
 - g. Means and methods of covert testing and use of results;
 - h. Any action deemed necessary by the Administrator or his or her designee to carry out the agency mission during emergencies;
 - i. Disciplinary standards and penalties; and
 - j. Internal security practices.
4. The collective bargaining agreement will expire at the end of its stated term and will not roll over or otherwise remain in effect after that date.
 5. The term of the collective bargaining agreement will not be less than three (3) years or more than five (5) years.
 6. Bargaining for any new collective bargaining agreement will begin 120 calendar days before the expiration date of the existing collective bargaining agreement.
 7. The parties will agree on ground rules for collective bargaining within 30 calendar days of commencing negotiations on ground rules. If agreement on ground rules is

not reached within 30 calendar days, outstanding issues will be put before the rights based process established under § V below for final resolution of these issues.

8. Collective bargaining will begin within 30 calendar days after ground rules are agreed upon or decided through the resolution process and will continue for no more than 90 calendar days.
9. The period of collective bargaining may be extended for one 30-day period, if TSA and the union agree to this extension. There will be no additional extension of the period for collective bargaining.
10. If, at the end of the period for collective bargaining, agreement is not reached on any issues that have been subject to the collective bargaining process and are within the subjects deemed appropriate for collective bargaining under this Determination, those issues will be put before the rights based process established under § V below for final resolution of issues pertaining to or arising from collective bargaining.
11. The parties to and participants in collective bargaining negotiations will attend joint training on interest-based negotiation prior to commencement of bargaining.
12. Collective bargaining negotiations will be facilitated by one or more facilitators/mediators from the Federal Mediation & Conciliation Service (FMCS) or other mutually agreed upon entity. If either party objects to a proposed facilitator/mediator, he or she will not be selected to provide facilitation or mediation services.
13. Collective bargaining negotiations will take place in proximity to TSA Headquarters.
14. Should an exclusive representative be elected and certified consistent with this Determination, a future election may be conducted by the FLRA for the purposes described in this Determination provided the election is conducted under the principles and conditions set forth in this Determination and subject to the following:
 - a. A collective bargaining agreement between TSA and the exclusive representative agreed to as provided for under this Determination has been in effect for more than three (3) years and the FLRA has not conducted an election for the unit employees within the previous 12 calendar months.
 - b. A petition may be filed with the FLRA for a new election if 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative for the majority of employees in the unit.

- c. Any labor organization which has been designated by at least 10 percent of the employees in the unit specified in any petition filed under section (b) above may intervene with respect to the petition filed under section (b) above and shall be placed on the ballot of any election as determined by the FLRA.

IV. Rights, roles, and responsibilities:

A. Covered Employees:

1. All covered employees are free to join, support, or request representation, consistent with this Determination, by any union without fear of coercion or retaliation. No covered employee is or may be required to join or support a union or pay union dues or fees if not a member of that union.
2. Prohibition of Retaliation: Consistent with operational requirements and agency policies, all unit employees may use and participate in the representational framework set forth in this Determination. While TSA encourages employees to engage in problem-solving within their chain of supervision, TSA prohibits any form of reprisal or retaliation for raising a concern or complaint through other avenues of redress, practices, and processes provided by TSA or for serving as a representative of a co-worker in these processes. Retaliation or threats of retaliation against covered employees for participating in this framework or against supervisory or management employees for acting in a manner consistent with the principles and requirements of this framework will constitute grounds for corrective or disciplinary action.
3. Covered employees may designate any individual, whether or not that person is employed by, a member of, or a representative of a union, to be his/her personal representative in the resolution process set forth below in § V or under TSA Management Directives providing for personal representation if that person is willing and available to serve in that capacity and is not disallowed for any of the reasons set forth in TSA MD 1100.63.3, § C, and its successors. However, if a union is selected as the exclusive representative of the unit employees, no other union may provide personal representation to covered employees. The designation of a personal representative must be in writing and signed by the covered employee requesting representation.
4. Covered employees who request representation will have a right to representation by a personal representative during an examination or investigation by the Agency which the employee reasonably believes may result in discipline provided that: such representatives are not disallowed for any reason set forth in TSA MD 1100.63.3, § C; if a union is selected as the exclusive representative of the unit employees, no other union may provide this representation; and provided that securing such representation does not unreasonably delay the investigation.

5. All covered employees will have the right to vote in a referendum on whether or not to support any collective bargaining agreement negotiated by TSA with a duly elected exclusive representative before such agreement becomes binding and effective.
6. Official time:
 - a. The parties will agree on a reasonable number of unit employees who may serve on the bargaining committee of the union for the national collective bargaining agreement, if a union is certified by the FLRA as the exclusive representative of unit employees, and these employees will be afforded reasonable amounts of official time to perform this function consistent with mission requirements.
 - b. An employee serving as a representative of a co-worker in the resolution process at § V of this Determination or under TSA Management Directives and employees serving as union representatives in formal meetings or fulfilling other union responsibilities as set forth in this Determination will be entitled to reasonable amounts of official time consistent with operational needs and the scale and duration of the matter at issue but in no instance will official time for a given matter or meeting exceed eight (8) hours without written justification submitted to management and written approval from the Federal Security Director (FSD) to whom the covered employee ultimately reports or the FSD's designee.
7. Employees are responsible for maintaining respectful and constructive communication on work issues and concerns with co-workers as well as management, and for acting in a manner characterized by cooperative problem solving approaches to raising and seeking resolution of issues.

B. Unions:

1. Unions participating in the election shall have the right to engage in campaign activities consistent with the conditions in this Determination.
2. If a union is certified by the FLRA as the exclusive representative for purposes consistent with the provisions of this Determination, such union shall have the right to:
 - a. At the national level, engage in good faith, interest-based collective bargaining with respect to such terms and conditions as are national in scope and within the ambit of § III(B)(2);

- b. Enter into a collective bargaining agreement reached as a result of good faith collective bargaining if approved by covered employees in a referendum as provided in § III(B)(1)(e);
 - c. Request and receive from TSA information maintained by TSA in the normal course of business, reasonably available, and relevant and necessary to understanding subjects within the scope of bargaining as defined in § III(B)(2) consistent with TSA's requirements for Sensitive Security Information (SSI);
3. If a union is certified by the FLRA as the exclusive representative for purposes consistent with the provisions of this Determination, such union shall have the right to represent covered employees in the Resolution Process set forth below in § V or in any proceeding recognized in TSA Management Directives as appropriate for personal representation (e.g., the Disciplinary Review Board or EEO proceedings) provided as follows:
- a. A covered employee has requested, in writing, that that union represent him or her.
 - b. A union certified as an exclusive representative by the FLRA must represent a covered employee who is a dues paying member of the union or covered employees who are dues paying members of the union if that employee or group of employees request representation.
 - c. A union may represent a covered employee who is not a dues paying member of the union or covered employees who are not dues paying members of the union but is not obligated to do so.
 - d. An individual acting as a representative under these provisions must, unless he or she is a TSA employee, sign a SSI non-disclosure agreement and will be considered a covered party under 49 C.F.R. § 1520.7.
4. A representative of any union certified as the exclusive representative will have the right to be present at formal discussions provided that, except during collective bargaining on appropriate subjects occurring at the national level, the union's role in such meetings is limited to providing information and stating the interest(s) of the union and/or covered employees. A formal discussion is any meeting that is prearranged between one or more representatives of TSA management and one or more unit employees on a specific topic or topics concerning personnel policies, practices, or other conditions of employment. Impromptu discussions between a supervisor and a subordinate, routine staff meetings, or individual performance counseling sessions are not considered formal discussions. Further, this paragraph does not amend or broaden the rights to personal representation afforded under TSA Management Directives addressing personal representation rights and under §

IV.A.3. and 4 above or provide a right to union representatives to be present when a covered employee has not selected a union or union representative as his/her personal representative under TSA management directives and above under § IV.A.3 and 4.

5. An exclusive representative will have the right to be notified of any changes to Government-wide rules or regulations applicable to TSOs and will have the opportunity to present the union's views and recommendations regarding these changes. TSA will consider any recommendations and provide a reply, in writing, stating the reason or reasons why the recommendations were or were not adopted.
6. An exclusive representative must maintain respectful and constructive communication on work issues and concerns with TSA employees and management and act in a manner characterized by cooperative problem-solving approaches to raising, addressing, and seeking resolution of issues.

C. TSA management must:

1. Maintain respectful and constructive communication on work issues and concerns with co-workers, subordinates, upper management and union representatives.
2. Act in a manner characterized by cooperative problem solving approaches to raising, addressing, and seeking resolution of issues.

D. TSA may:

1. Maintain and manage terms and conditions of employment for covered employees in place on the date of this Determination until such time as the terms and conditions may be changed through a binding collective bargaining agreement affirmed, as provided for in this Determination, in a referendum held among covered employees.
2. Make changes to the terms and conditions of employment for covered employees unless and until a term or condition is superseded by a binding collective bargaining agreement provision that addresses that particular term or condition.
3. Where a term or condition of employment for covered employees is excluded from collective bargaining (see § III(B)(3)), change that term or condition irrespective of any collateral impact that change does or might have on a matter within the scope of collective bargaining.
4. Engage with any covered employee or covered employees generally on any matter or deal with any employee group on issues affecting covered employees except that TSA will not engage in collective bargaining resulting in a binding collective

bargaining agreement with any entity other than a union which has been certified as the exclusive representative of the covered employees by the FLRA provided that a union is so certified.

E. Conditions on union campaign activities:

1. TSA will allow union campaign literature to be posted on unofficial bulletin boards and left in TSA break rooms. This literature must be reasonable in size so as not to foreclose postings and distribution by other unions or employees seeking to post non-campaign related literature. Each page of campaign literature must be dated and cannot refer to any specific TSA employee in a derogatory fashion. TSA retains discretion to remove campaign literature of excessive size or volume or to remove campaign literature three (3) weeks after a document's listed date to permit posting of other campaign and non-campaign postings. TSA also retains the right to counterfactual inaccuracies in campaign literature that directly pertain to security or TSA operations or the processes established through this Determination.
2. TSA will establish a location on TSA.gov to which all covered employees will have access and which will have links to the websites of each union participating in the election conducted by the FLRA.
3. TSA reinforcement of its neutrality: Prior to or during the campaign period, the Administrator and Assistant Administrator for the Office of Security Operations will issue a TSA Broadcast statement about management neutrality. This message will be reiterated in a Webcast on TSA-TV and reinforced by local leadership. Failure to comply with management neutrality requirements will constitute grounds for corrective or disciplinary action.
4. Sensitive Security Information (SSI):
 - a. Prior to engaging in any further campaign activities, the unions participating in the election will agree in writing, on behalf of themselves and their employees, agents, and contractors engaged in campaign activities, to comply with all requirements and limitations prescribed in 49 C.F.R. Part 1520 with respect to access to, use, and handling of SSI.
 - b. Within five (5) calendar days after receiving a union's written agreement regarding SSI, TSA will issue an order pursuant to 49 C.F.R. § 1520.15(e) deeming union's employees, agents, and contractors engaged in campaign activities to be covered persons under 49 C.F.R. § 1520.7.
 - c. As needed, TSA may prescribe additional limits and conditions on access to SSI. TSA will offer training materials to unions concerning appropriate use, handling, and protection of SSI.

- d. Unions will inform TSA immediately if there is any unauthorized disclosure of SSI by any of its employees, agents, or contractors.
5. Mission-related moratorium on campaigning:
- a. When required by mission-related needs, including but not limited to heavy holiday travel periods or emergency operations, TSA may impose a moratorium on some or all union campaign activities.
 - b. TSA will post a notice of the moratorium on its publicly available website and will provide individual notice to the unions participating in the election.
 - c. Upon posting of the moratorium on TSA's website or upon receipt of individual notice, whichever is earlier, campaign activities by a union must immediately cease to the extent required by the moratorium.
 - d. If appropriate, TSA has no objection to the FLRA extending the period for union campaign activities by the number of days during which a moratorium was in place or taking other appropriate actions to ensure that the full campaign period is available.
6. Union representatives' contacts with covered employees:
- a. Union representatives, including representatives who are employees of other agencies (such as U.S. Customs and Border Protection), shall not engage in any way with covered employees who are on duty except for the sole purpose of determining the duty status of the covered employee if such status is unclear.
 - b. It is not always apparent whether a covered employee is on duty. Therefore, if a covered employee is on duty, he or she must immediately state that he or she is on duty if approached by a union representative and the union representative must immediately terminate contact with the covered employee.
7. Limits on location of campaign activities:
- a. Union representatives will not approach covered employees or engage in union activities within the vicinity of security checkpoints or baggage screening areas. If union activities are determined to be interfering with security operations, a TSA management official may inform union representatives that they must relocate their activities to a less disruptive location.
 - b. No non-TSA employee will be admitted to TSA break rooms or training rooms or offices for the purpose of conducting campaign-related activities.

8. TSA-TV: During the campaign period for the election, TSA will offer to air on TSA-TV one prerecorded message from each union lasting no more than ten (10) minutes for the sole purpose of setting forth what that union views as the benefits of representation by that particular union. These broadcasts will be accessible by covered employees at their convenience on TSA computers when off-duty or on break.
9. During the election period, TSA will not halt existing forms of employee engagement and cannot discontinue efforts to improve agency performance through alterations in working conditions. These actions are deemed mission critical, are not intended to influence the outcome of the election, and will not be the basis for either objections to the election or unfair labor practice charges.
10. During the voting period, no party will engage in actions that interfere with, influence, or coerce covered employees at the time when covered employees are casting their ballots. Covered employees must be able to cast their ballots in an environment that preserves their freedom of choice and the integrity of the secret ballot.

V. Resolution Processes:

A. I have concluded that:

1. TSA must create an environment in which all employee issues and concerns whether they go to the core of the security mission or affect the employees who carry it out, can be raised with confidence that they will be heard and, if possible, addressed, without fear of retaliation;
2. TSA's employees deserve a resolution system that is fair, transparent, and efficient; and
3. TSA's mission requires that disputes, including those related to union activity and collective bargaining, be resolved quickly and collaboratively and without protracted and potentially acrimonious litigation.

- B. Therefore, I have determined that TSA will, without delay, develop a unitary dispute resolution system, including both interest-based and neutral, third party rights-based options. The core principles, objectives, and requirements of this system are set forth below. The details of this system will be developed prior to the conclusion of an election process. Should a union be certified as the exclusive representative, at that time the details of the system will be shared with the exclusive representative and its input, comments, and concerns will be considered. Suggestions for modifications to the system from the exclusive representative will be adopted to the extent possible and, if

not adopted, TSA will explain in writing the basis for its decision. This system will not be subject to the collective bargaining process except that details of the initial local phases of the resolution process may be subject to bargaining at the discretion of TSA.

C. Core Principles, Objectives, and Requirements for Resolution Processes under this Determination:

1. It is in the interests of both covered employees and management that issues and concerns be raised and resolved as close to the origin of the issue or concern as possible by the affected individuals or groups themselves.
2. The unitary resolution process established will be fair and, when not involving a confidential resolution process, transparent, with provisions designed to ensure that issues, concerns, and disputes are addressed equitably and in a timely manner.
3. The unitary resolution process will cover the resolution of issues raised by, between, or among employees covered by this Determination, the exclusive representative, if any, and TSA except that issues concerning the representation election process that arise before the election or arise in the form of objections or challenges after the election will be resolved by the FLRA under its processes as consistent with this Determination.
4. The resolution processes established under this Determination will provide that the first step in addressing most issues will be an interest-based conversation between or among the individuals or groups closest to the issue.
5. Recognizing that some issues must be addressed in particular forums, such as Workers' Compensation claims or Whistleblower or discrimination complaints, the resolution system will include safeguards to ensure that employees and union representatives are fully informed about dispute resolution processes including mandatory and/or rights-based processes with filing deadlines.
6. Recognizing that some issues are not amenable to localized solutions, other avenues will be bolstered or created to ensure that such issues can be raised and, when possible, resolved confidently and effectively.
7. Recognizing that the resolution of some issues will, despite the parties' best efforts, require neutral assistance, the resolution system will, in appropriate circumstances, provide neutral assistance to enable the parties to reach interest-based solutions. Such interest-based resolution assistance may include, as appropriate, coaching, facilitated interest-based discussions, mediation, and other neutral third-party approaches that assist parties to raise and resolve issues, concerns, and disputes themselves.

8. Recognizing that some disagreements will require a rights-based decision made by a neutral decision-maker, credible rights-based systems will be established.
9. The system for resolving disputes on the following issues will include a rights-based mechanism for final decisions by panels selected from a roster of neutrals, with backgrounds in both security and collective bargaining, who are mutually agreed upon by both TSA and the certified exclusive representative:
 - a. After certification of an exclusive representative, issues that arise during the collective bargaining process, including but not limited to:
 - i. Failure to agree on ground rules;
 - ii. Allegations of failure to bargain in good faith; and
 - iii. Failure to agree on terms of the collective bargaining agreement.
 - b. After certification of an exclusive representative, allegations that:
 - i. Management or the exclusive representative has interfered with, restrained, or coerced any employee for exercising their rights regarding union activity as set forth in this Determination or rights established under a binding collective bargaining agreement;
 - ii. Management or the union failed to act in a manner consistent with this Determination;
 - iii. The exclusive representative coerced, disciplined, fined, or attempted to coerce a unit employee as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance, productivity as an employee, or the discharge of the member's duties as an employee; and
 - iv. Management or the exclusive representative failed or refused to comply with a binding collective bargaining agreement.
10. All matters that are not resolved through informal interest-based conversation or processes will be entered into a database by location and subject (without reference to the names of those involved). This database will record the timeliness of steps in the process and be reviewed on a regularly scheduled basis by those responsible for the

resolution process system and those responsible for field operations to ensure accountability and in order to identify systemic issues and potential locations of concern.

11. After 18 months in operation, the entire resolution system will be evaluated by an expert independent third party under standards and requirements agreed upon by TSA and the exclusive representative, if one is certified, and this third party will produce a report for TSA that will be shared with that exclusive representative and the workforce.

2/4/11
Date

John S. Pistole
John S. Pistole
Administrator