



CONGRESSIONAL TESTIMONY

EVERETT B. KELLEY, NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

HOUSE COMMITTEE ON HOMELAND SECURITY
TRANSPORTATION AND MARITIME SECURITY SUBCOMMITTEE

HEARING ON

**"TWENTY YEARS OF WORKFORCE CHALLENGES: THE NEED FOR H.R. 903, THE *RIGHTS FOR
THE TSA WORKFORCE ACT OF 2021*"**

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Chairwoman Watson Coleman, Ranking Member Gimenez, Committee Chairman Thompson and members of the Homeland Security Committee: My name is Everett B. Kelley, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of over 700,000 federal workers represented by our union, including over 41,000 Transportation Security Officers (TSOs), I appreciate the opportunity to offer testimony at today's hearing before the Subcommittee on Transportation and Maritime Security of the Committee on Homeland Security, "Twenty Years of Workforce Challenges: The Need for H.R. 903, *the Rights for the TSA Workforce Act of 2021*". The title of this hearing does not evoke nostalgia. Instead, please let it be a sounding call to action because the TSOs we represent have experienced continual mistreatment, fewer rights and lower pay than their fellow federal employees as a result of the way the Transportation Security Administration (TSA) was authorized. I am here today to reinforce this message: Granting TSOs the same, full rights under title 5 of the U.S. Code as other federal employees would directly improve the ability of TSA to provide the flying public the highest level of aviation security.

I thank the many members of Congress on both sides of the aisle who stood with TSOs and voted for legislation in the 116th Congress to ensure that TSOs have title 5 collective bargaining rights, full due process rights, and fair pay. Unfortunately, the legislation was not considered in the Senate last year and we thank Chairman Thompson for reintroducing the bill in this Congress. AFGE fully supports H.R. 903, the "Rights for the TSA Workforce Act of 2021" and is working toward its enactment.

TSOs' lack of statutory rights is rooted in a combination of two things: First, a desire by the government to provide aviation security on the cheap; and second, a pernicious belief that worker rights are somehow contrary to homeland security. TSA apparently bases its personnel policies on both notions even though each is demonstrably false, and each has made it more difficult for the agency to provide security to the flying public. Above all else, TSA desperately clings to its authority under §111(d) of the Aviation and Transportation Security Act (ATSA) (Pub.L. 107-71).

The footnote reads as follows:

Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal Service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under Section 44901 of Title 49, United States Code, (49 U.S.C. §44935 Note).

The footnote has been interpreted by courts and administrative proceedings as granting TSA almost unreviewable authority over TSO employment rights. AFGE was the first union to file judicial challenges to this interpretation beginning in 2003 and has continued to do so ever since. Congress has never before or since granted any other agency head this level of authority over a group of employees, and for good reason.

In the past, AFGE submitted testimony to Congress describing TSA working conditions as “separate and unequal.” TSA implemented two personnel systems: One created solely for TSOs and one for all other TSA employees, managers included, based largely on the Federal Aviation Administration (FAA) personnel system that applies most of Title 5 of the U.S. Code.

Over 41,000 TSOs are denied the ability to appeal adverse personnel decisions to an objective, outside body like the Merit Systems Protection Board (MSPB) or through negotiated grievance procedures. In contrast, like most federal workers, TSA managers *can* appeal adverse personnel decisions (including removals) not only to the MSPB but also to the U.S. Court of Appeals. TSOs are subject to a cumulative disciplinary system unlike the progressive disciplinary system applied across other federal agencies, including other Department of Homeland Security (DHS) components. For too long, the TSO workforce has performed their jobs effectively, efficiently, and with a professional demeanor, all the while under duress largely at the hands of TSA management and its inconsistent application of both discipline and reward.

The Federal Aviation Administration (FAA) reauthorization in the 115th Congress (H.R. 302) included Section 1907, Personnel Management System Review directing: “the Administrator shall convene a working group consisting of representatives of the TSA and representatives of the labor organization representing security screening personnel to recommend reforms to the TSA’s personnel management system, including appeals to the Merit Systems Protection Board and grievance procedures.” TSA met the minimum requirements to meet but was unwilling to conduct any meaningful discussion of a route to MSPB and did not adopt meaningful changes to grievance or discipline procedures.

The events of the past three years put into clear focus the dire need for legislation to protect TSOs’ basic rights at work and even their lives. Not only did TSOs work without pay throughout the 2018-2019 government shutdown; a year later, as many were still struggling to get back on their feet financially, they were hit swiftly and pervasively by the COVID-19 pandemic.

COVID-19 Pandemic

Every action taken by TSA to protect the workforce during the pandemic has been a hard-fought struggle between management and TSOs. Early in the pandemic, supervisors pushed back when TSOs requested to wear masks and face shields and were slow to develop safety protocols. When masks and face shields were permitted, TSOs had to supply them

themselves. Later, TSA managers were quick to discipline TSOs who didn't comply with those same personal protective equipment (PPE) requirements. Leave policies were developed, but unevenly applied; while TSOs in one airport may have been granted weather and safety leave after close exposure to officers who developed COVID-19, TSOs in another airport were disciplined, considered absent without leave for taking leave under the same circumstances.

Make no mistake – the uncertain and unequal application of leave and illness policies throughout the pandemic is only the most recent but surely the most egregious evidence this agency must no longer administer its own separate and unequal personnel management system.

To date, TSA has reported more than 7,700 cases of COVID among its employees, almost entirely in the screening workforce, including 16 deaths. TSA could not have prevented all of the COVID-19 cases, but it could have taken faster action to protect its workforce. For months, TSA Administrator David Pekoske refused to require that passengers and other members of the public wear masks to go through security checkpoints.

To make matters harder on part-time TSOs, hours were cut to only 20 hours per week rather than 25-30 hours and until the Chairman of this Committee insisted, TSA had stopped providing new part-time employees hired after October 2019 the full government share of their health care premium. The simple truth is rights at work are not a luxury or a benefit, but absolutely essential when employers have the power to make life and death decisions about workers' safety.

TSA Personnel Policies

TSA's application of its authority granted by the ATSA footnote has created a personnel system that repeatedly leads to dismal workplace satisfaction rankings. We know from the results of the most recent "Best Places to Work in the Federal Government" survey that TSA employees failed to rank the agency above the lowest quartile (25%) in any category with the exception of training. In addition to TSA coming in dead last on satisfaction with pay, TSA employees provided remarkably low scores on the fairness of leadership, matching employee skills to the mission, performance-based rewards and advancement, and teamwork and innovation. The low marks of this survey correlate with concerns AFGE has raised for the past 19 years.

19 years of TSA running its own personnel management system has devolved into a toxic work environment where supervisors and managers foster a culture based on bullying, intimidation, and fear. TSOs work under the constant threat of being written up, of being disciplined unfairly and inconsistently, and never feeling respected. TSOs who file complaints,

formally or informally, are punished and alienated. Their coworkers look the other way because they fear they will be next. Under this culture, there is no path to report harassment, mistreatment or even unsafe working conditions. There is no meaningful way to appeal the actions of managers.

Pay

I began this testimony by noting that TSA cannot provide aviation security on the cheap. Because TSA has abused its authority under the ATSA footnote, and used it to shortchange its employees, the agency has actually made it harder to recruit and retain the career, professional workforce the public demanded following the terrible events of 9-11. TSA Administrators have continued to disappoint the TSO workforce by failing to request additional funding from appropriators for a meaningful pay increase for long term TSOs. Federal Security Directors (FSDs) have used public resources to communicate agency views intended to turn the TSO workforce against the General Schedule (GS) locality pay system and suggest pay is better under the current TSO-specific system, yet they tell Congress they can't migrate to the GS locality system because they don't have enough funding to do so. It cannot be simultaneously too expensive to provide fair pay and disadvantageous for the workers to provide fair pay. TSA management cannot have it both ways.

The average starting salary for TSOs is about \$35,000, just under \$17 an hour. A newly hired TSO begins in the D pay band and is required to complete a two-year probationary period during which time they can be disciplined or terminated for any reason without due process. At the completion of probation, TSOs automatically receive the E pay band in addition to any Employee Cost Index (ECI), an annually recommended federal civilian employee pay increase. The majority of TSOs are then stuck at the E pay band for their entire career. In the event a TSO can secure a promotion to a Lead TSO, they go up a half step to an E2 and a very few will advance to a one full level to the F pay-band. But the outlook from there is grim. TSA eliminated the ability of bargaining unit employees to be promoted to a G pay band position in 2017.

If TSOs score high enough on the Transportation Officer Pay System, or TOPS evaluation, they may be eligible for a one-time bonus or a slight increase in salary at the subjective discretion of their manager. The TOPS "payout"—a combination of a percentage pay raise and bonus depending on evaluations and other factors—varies from year to year subject to the Administrator's instructions. Last year, the TOPs award for the highest rating of 5 – achieved excellence or 4 – exceeds expectations was a one percent pay increase. If you scored a 3 – achieved expectations, you received no pay increase. These inconsistent and miniscule performance-based increases, particularly when they are not combined with a time-in-grade increase, do very little to retain or reward the frontline aviation security workforce that protects us around the clock. TSA recently layered in a Model Officer Program that recognizes only the top five percent of the entire screening workforce, noting that any associated pay is

subject to availability of funds. In its guidelines it advises: “Model Officer Recognition is granted at management’s discretion. Meeting the minimum criteria does not guarantee or create an entitlement to a Model Officer Monetary/Non-Monetary Award and/or a Model Officer Pay Increase.” Under this guidance, a TSO has no means of knowing whether meeting the requirements will mean anything. So the question arises: What is the point of this program?

Any bonuses a TSO may earn under TOPS are not included in TSO base salaries and are not part of the calculation for their retirement under Federal Employee Retirement System. TSOs’ lack of opportunity for salary increases today has long-term financial consequences—less retirement income later in life. By contrast, most federal workers have been compensated under the GS locality pay system, which has been reformed and updated many times since its inception in 1949. The GS locality pay system includes step increases at various intervals to employees with satisfactory performance. When there is not a pay freeze, they also receive annual salary adjustments that include a nationwide and locality component. These pay adjustments are based on objective market data from the Bureau of Labor Statistics and mirror the size and direction of salaries in the private sector and state and local government. The GS pay system is notable for the absence of pay discrimination; people in the same job with the same level of performance receive the same salaries regardless of race, gender, age or other attributes unrelated to the job they do for the American people.

Administrator Pekoske has advertised the Career Progression Program as a career path for TSOs that will both improve retention as TSOs move up the ladder and a means to improve pay. AFGE appreciates Administrator Pekoske’s intentions, but the Career Progression Program, which TSA did not negotiate over with the Union, does not meet those goals. The Career Progression Program only assists new-hires in receiving pay increases to an E-band level more quickly than before but does absolutely nothing for long-term employees.

When AFGE testified before this committee about the need for title 5 collective bargaining rights and the GS pay scale two years ago, it was on the heels of the release of two reports: the March 29, 2019 DHS Office of Inspector General Report (OIG), *TSA Needs to Improve Efforts to Hire, Retain and Train Its Transportation Security Officers* and a May 2019 Blue Ribbon Panel report TSA commissioned a private company to conduct, “*Human Capital Service Delivery Evaluation*.” Both reports acknowledged the high turnover and low pay TSOs face, noting that TSOs are paid only a third of what Management, Administration and Professional (MAP) pay is at TSA. The Blue Ribbon panel wrongly concluded that TSA should not utilize the GS pay system. It acknowledged that under the GS system, it takes a full 18 years to reach step 10 in a pay grade without recognizing that in TSA’s pay band system, it takes 30 years to reach the top of the pay band, essentially the length of a full career.

The DHS OIG report recommended additional funding is needed to fill program positions. TSA has also promoted a new On the Job Trainers (OJTs) program as a way for officers to receive extra incentive pay but these opportunities are very limited and do not

change an officer's salary. Federal Security Directors (FSDs) and other management officials determine how many OJTs they need depending on operational need and they decide who gets to be an OJT.

Many airports are located near major metropolitan areas with high costs of living. Many TSOs cannot afford to rent a two-bedroom apartment or purchase a car on their salaries. At airports such as San Jose International in Silicon Valley, TSA has offered TSOs recruitment and retention bonuses to maintain its workforce. At the Seattle-Tacoma International Airport, TSA was required to raise TSO pay in response to the city's implementation of a minimum wage increase to \$15 per hour, or about \$31,000 per year. TSA currently identifies 89 TSO essential job functions in its current TSO medical guidelines and has established rigorous standards for employment. TSOs often seek employment at other federal agencies. The advantages of seeking employment with another federal agency are substantial for a TSO: A likely significant pay increase, clear and achievable career progressions, full civil service rights under Title 5, and the ability to maintain their commitment to public service. TSA is investing money to hire, train, and employ an officer only to see them leave for higher paying private employment or go to another federal agency covered by the GS pay system.

Finally, it is important to note that high ranking TSA officials are paid under the Title 5 guidelines for the Senior Executive Service and the agency has sought special discretion to increase the pay of upper management. The 100 highest paid TSA employees all earn over \$175,000 annually. By pointing out the disparity in pay between TSOs and the top brass at the agency we make no assumption that the executive pay is unearned. AFGE does find it highly inappropriate that the pay disparity between TSA management and TSOs is comparable to the pay difference of Walmart store managers and salesclerks.

TSO Retention Issues and Staffing

The findings of the DHS OIG report two years ago confirmed AFGE's warnings that TSA has become a revolving door for the TSO workforce at many airports. The trend continues and it is even clearer that TSA's personnel policies are directly linked to retention problems. Throughout 2020 as the COVID-19 pandemic raged and travel declined precipitously, TSA allowed the TSO workforce to drop from about 46,000 to fewer than 41,000 officers. With travel resuming, TSA is again hiring. As a cautionary note during this time of hiring and training, AFGE has observed that although TSOs at checkpoints are not OJTs, they assist the many newly hired TSOs as they learn their duties and have noted that many appear ill-prepared.

TSO schedules at some airports are constantly manipulated to meet airline arrivals and departures. As a result, TSOs have little stability in their schedules. Women TSOs have even less flexibility because they make up a smaller portion of the workforce but must be available on every shift and every checkpoint for pat-downs. Because there is little room in TSA's staffing decisions, at some airports nursing mothers report managers expect them to express breast

milk only at specific designated times and are refused breaks as needed. Non-private expressing areas are often too far away for the time allotted. Other TSOs have reported denial of bathroom breaks resulting in unnecessary and demeaning accidents.

Many TSOs Perceive TSA to be a Hostile Work Environment

The results of the DHS OIG report on TSA recruitment and retention of its TSO workforce matched AFGE's Freedom of Information Act (FOIA) data which revealed that over a 10-year period between 2008 and 2018, TSA replaced its approximate 44,000 workforce. TSO duties are not easy. The initial responsibility for the safety of the flying public is assigned to TSOs screening passengers and baggage. Dealing with passengers can be stressful and physically taxing, however, AFGE represents thousands of federal employees with stressful and taxing positions. The difference is that federal employees outside of TSA represented by AFGE do not work under the smothering cloak of unfairness described by their TSO brothers and sisters.

Under TSA's interpretation of ATSA, the agency makes and breaks the rules of employment. As noted above, TSA reinvents pay standards annually. Airport checkpoints are often the fiefdoms of TSA management, reducing the likelihood of consistency between checkpoints or baggage screening areas. All levels of TSA management exercise extensive discretion in supervision and discipline of TSOs. Much of it is subjective and has devolved into a culture of harassment and intimidation that can only end with a permanent end to the separate and unequal personnel management system.

Below are some of the situations described by TSOs in the daily performance of their duties.

Male TSO, Washington State

J has been a TSO for over five years. When he returned from surgery unrelated to vision last June he was told to take a color vision test. He was told he failed the test, but not provided the results. He was sent for a second test at a chain optometry store. He was told he failed that too, but TSA refused to provide the results of either test. He was stunned because in the past he had worked in color analysis for a makeup company. He went to his own optometrist and to another location of the chain optometry store. He passed both tests and took them to his employer. He has taken multiple bag screening tests since then and has passed with 90 percent but was still proposed for removal. He appealed and to date, neither he nor the in-house Office of Professional Responsibility Appeals Board has received the color vision test results. He was told he would be reinstated but has again been told he is not medically fit for duty. Under MSPB, his reinstatement would not have been arbitrarily denied by the agency.

Female TSO, New York

S worked at TSA for almost two years. During that time, she endured harassment from her manager – this included reference to anatomy size and uncomfortable requests to close the door to his office. She was also subjected to repeated intimidation by her supervisor. Rather than providing instruction on a new Covid-related standard operating procedure, the supervisor set her up so others could watch her fail and made it a joke. When a passenger complained about communication with her, the on-site supervisor asserted the situation did not happen, but she still got written up by a supervisor who didn't see it. Her supervisor engaged in a frequent barrage of threats to "write her up." When she turned to coworkers to corroborate what they witnessed they said they wouldn't back her up because of fear for their own jobs. There is no recourse, no accountability.

Female TSO, Pennsylvania

M has been a TSO for almost nine years. She works full time and as does her husband, but they have two children under six in daycare, and she still has \$30,000 in student loans from college. She is the first to volunteer to pick up every extra shift she can get, often working 7:00 AM to 9:30 PM or 11:00 AM to midnight and giving up most of her days off. Because of the low pay, she has sacrificed work-life balance and time with her family and says they barely make ends meet.

Female TSO, Maine

N received an "employee of the month" designation ten months into her first year of service. Her Mid-Year performance appraisal rated her "Exceeded Expectations in all Competencies and Goals" a few months later. One week after that excellent appraisal, she informed TSA that she was pregnant. Over the next several weeks, she experienced troubles with her pregnancy and used accrued sick leave, receiving TSA Management's approval of each and every one of her sick leave requests. Three months later, she was fired and has a pending EEOC suit. This was an excellent employee who loved her job.

Female TSO, Arizona

J, a TSO for eight years, was summoned for a random breath blood alcohol test. She had not been consuming alcohol and had no reason to be concerned with the test. However, she had trouble with the equipment and the ability to blow sufficient air into the machine. She was terminated because it was determined she had no medical reason to provide an insufficient sample. She was never given due process to prove she has never reported for work impaired by alcohol and was not impaired at the time of the random test. She appealed a denial of unemployment benefit claims and won that appeal because the state found that the employer did not meet the burden of proof that she was disqualified for misconduct.

These and other responses from across the country were strikingly similar in their details: unfair treatment, no remedy when reported to management, and almost certain retaliation.

Unwarranted disciplinary actions against TSOs present an opportunity for badly-trained and poorly-managed supervisors to victimize TSOs. In 2018, TSA modified their table of penalties for the TSO workforce based on a fundamental misunderstanding of the concept of progressive discipline. Progressive discipline provides increased penalties for particular types of conduct. Under TSA's version of progressive discipline, for example, a tardy will count as the first offense, an unrelated uniform violation as a second offense that includes a more severe disciplinary action which could lead to a proposed removal even though a tardy and a uniform violation are completely different forms of misconduct. There is little incentive to the employee to improve behavior or misconduct.

Each disciplinary action remains in the TSO's personnel files for two years. The mandatory two-year presence of a previous disciplinary action in a personnel file negatively affects almost anything a TSO attempts to do at the agency. TSOs with disciplinary actions in their personnel files cannot transfer to another airport and face disqualification from the Career Progression program. Any corrective action, discipline, or sick leave restriction during the 12 months prior or during the OJT assignment is a disqualification and eliminates a large score of employees from receiving the highest TOPS rating.

The unrelentingly harsh disciplinary policies of TSA do not create a work environment that fosters workforce performance growth and improvement. A disciplinary action grinds a TSO's forward progress to a halt for at least two years. It is difficult for TSOs to clear their record without the right to appeal adverse personnel actions to the MSPB or a negotiated grievance and arbitration process.

The Future of U.S. Aviation Security

Nineteen years ago, TSOs organized the first AFGE TSA local indicating a clear preference for union representation. They stood up for the union without statutory protections of their right to organize. AFGE is committed to the fight for full civil service rights and protections for the TSO workforce. Low pay, stressful duties, and a sense of unfairness create a trifecta for low morale and hopelessness that impedes the ability of TSOs to boldly serve as the frontline of U.S. aviation security.

TSOs have stepped up and reported for duty through the lengthy government shutdown and the COVID-19 pandemic. Many have dedicated themselves to this career protecting the traveling public and now they are hoping their dedication will be met with respect, basic rights and fair pay.

We appreciate the continued advocacy of Chairman Thompson and Chairwoman Watson Coleman in support of title 5 rights for the TSO workforce. Their legislation, H.R. 903, the “Rights for the TSA Workforce Act of 2021,” has well over 150 cosponsors in the House. When enacted into law this legislation will provide permanence and predictability of the statutory rights and protections of title 5 of the U.S. Code, the fairness of negotiated grievance and arbitration provisions, and MSPB appeal rights lacking in the work lives of the TSO workforce.

Thank you for holding this hearing and for the opportunity to speak on behalf of the TSO workforce represented by AFGE. I am prepared to answer any questions the subcommittee may have.