

**U.S. House of Representatives
Committee on Oversight and Government Reform**

Trey Gowdy, Chairman



**Misconduct, Retaliation, and Obstruction at the
Transportation Security Administration**

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Table of Contents

I.	Executive Summary	4
II.	Senior TSA Officials Engaged in Misconduct.....	8
A.	An Assistant Administrator Committed Removable Offenses but TSA Senior Leadership Intervened to Allow Him to Stay at TSA	8
1.	<i>The Assistant Administrator for the Office of Intelligence and Analysis Engaged in Inappropriate Behavior Towards a Female TSA Employee</i>	8
2.	<i>The Assistant Administrator Abused His Authority and Position</i>	15
3.	<i>OPR Recommended the Assistant Administrator be Dismissed from TSA</i>	19
4.	<i>Minutes After the Assistant Administrator Received the Notice of Proposed Removal, Senior TSA Officials Offered Him a Settlement Agreement</i>	26
B.	DHS OIG’s Investigation Determined Senior Managers Deviated from Agency Policy Regarding the Assistant Administrator	31
C.	TSA Senior Officials Continually Circumvented the Disciplinary Process to Avoid Repercussions for Their Actions	33
1.	<i>Deputy Assistant Administrator for the Office of Security Policy and Industry Engagement Drove While Intoxicated and Misled Police</i>	34
2.	<i>Assistant Federal Security Director for Inspections Made Offensive Comments, Engaged in Inappropriate Conduct, and Lied</i>	38
3.	<i>TSA Security Officials Engage in Several Acts of Sexual Misconduct</i>	40
4.	<i>Double Standards for Misconduct</i>	41
5.	<i>Regional Director in the Office of Global Strategies</i>	43
6.	<i>Deputy Federal Security Director</i>	45
III.	TSA Used Directed Reassignments to Retaliate Against Its Employees	47
A.	TSA Policies on Directed Reassignments	48
B.	TSA’s Use of Directed Reassignment Devolved Over Time	49
1.	<i>TSA Leaders Changed Agency Policy to Dramatically Expand the Use of Directed Reassignments</i>	49
2.	<i>Assistant Administrator Kelly Hoggan Played a Key Role in Implementing the Expansion of Directed Reassignments</i>	54
3.	<i>TSA Leaders Promised Employees the Directed Reassignments Would Strengthen TSA’s Workforce and Consider Employee Needs and Preferences</i>	56
4.	<i>TSA’s Leadership Instituted Mass Directed Reassignments</i>	59
5.	<i>TSA’s Mass Directed Reassignments Failed</i>	60
C.	TSA Reassigned Jason Brainard from Iowa to Maine	61

1.	<i>TSA Reassigned Brainard from Des Moines, IA to Portland, ME Despite Brainard Explaining This Would Cause Him Severe Hardship</i>	62
2.	<i>TSA Rejected Brainard's Requests for Accommodations to Mitigate the Reassignment's Impact</i>	63
3.	<i>TSA Ultimately Granted Brainard a Settlement to Take Position in Kansas</i>	66
4.	<i>TSA's Reassignment of Brainard Cost Taxpayers Over \$100,000</i>	69
5.	<i>Other FSDs Were Coerced to Retire Early in Exchange for Being Allowed to Remain in Their Positions for a Limited Time</i>	70
6.	<i>Senior TSA Leaders Acknowledge Brainard's Reassignment was Inappropriate</i>	71
D.	TSA Reassigned Andrew Rhoades from Minnesota to Florida	73
1.	<i>Andrew Rhoades Identified and Highlighted Security Vulnerabilities and Wait Time Falsification at Minneapolis St.-Paul Airport</i>	74
2.	<i>Rhoades Was Issued a Directed Reassignment Due to Suspicions He Was Providing Information to the Media</i>	79
3.	<i>Former TSA Acting Deputy Administrator Mark Hatfield Acknowledged Rhoades's Reassignment Was Inappropriate</i>	84
4.	<i>TSA Rescinded Rhoades's Directed Reassignment After He Filed a Complaint with the Office of Special Counsel</i>	87
E.	TSA Relocates the Honolulu International Airport DFSDs	94
1.	<i>The DFSDs Identified Significant Operational Deficiencies at Honolulu International Airport</i>	95
2.	<i>Deputy Assistant Administrator Joseph Salvator and Other TSA Senior Leaders Reassigned the DFSDs Out of Hawaii</i>	96
3.	<i>TSA's Assistant Chief Counsel for Administrative Litigation Acknowledged TSA May Have Violated the Whistleblower Protection Act</i>	100
F.	TSA Inappropriately Employed Directed Reassignments	102
1.	<i>TSA Improperly Used Directed Reassignments Against Other TSA Employees</i>	102
2.	<i>Senior TSA Officials Reportedly Wanted to Use Directed Reassignments to Coerce Disfavored Employees to Leave TSA</i>	104
3.	<i>The Committee's Investigation Prompted TSA to Institute Reforms and Reach Settlements with Affected Employees</i>	106
IV.	DHS OGC and TSA Lacked Transparency and Withheld Information from Investigative Entities	109
A.	Under the Guise of the "Attorney-Client" Privilege, DHS OGC and TSA Refused to Produce Documents to the Office of Special Counsel	109
1.	<i>The Office of Special Counsel (OSC) is responsible for investigating reprisal for whistleblowing</i>	109

2. *TSA planned to wait until OSC completed its investigations before determining disciplinary actions* 109

3. *TSA withheld information from its document productions to OSC* 111

4. *DHS OGC instituted the practice to withhold documents and information on the basis of attorney-client privilege*..... 112

B. TSA Refused to Comply with a Congressional Requests and a Congressional Subpoena
115

I. Executive Summary

The Transportation Security Administration (TSA) is charged with safeguarding America's aviation system. TSA screens more than two million passengers daily at approximately 430 airports.¹ The agency's mission is critical—there is no margin for error. With that in mind, and in light of a dynamic threat environment, it is imperative for TSA's workforce to function cohesively and collaboratively, from senior management to the rank-and-file employees on the front lines of transportation security. In this regard, TSA is failing.

Starting in 2015, the Committee received credible allegations of misconduct involving senior-level officials, and retaliation against whistleblowers who spoke up. The Committee launched an investigation and obtained documents and testimony substantiating many of the allegations. Senior TSA officials engaged in recurrent misconduct with minimal consequences. The Committee also found TSA leadership inappropriately used involuntary directed reassignments to retaliate against disfavored employees and whistleblowers, among other tactics.

Making matters worse, TSA—under the direction of the Department of Homeland Security's (DHS) Office of General Counsel (OGC)—obstructed various investigations which would have shed light on the agency's culture by withholding documents and information from Congress and the Office of Special Counsel (OSC).

The toxic combination of unchecked misconduct by senior officials and retaliation against rank-and-file whistleblowers undermined employee morale, reflected in the agency's astronomical attrition rates (as high as 20 percent in some segments of the workforce during the period in question)² and abysmal ranking in a government-wide job satisfaction survey (336 out of 339 agencies and components in 2017).³

Senior TSA Officials Engaged in Misconduct

The Committee found current and former senior TSA managers engaged in misconduct with alarming frequency, and routinely received favorable treatment during the disciplinary process. For instance, an internal TSA investigation concluded the Assistant Administrator for the Office of Intelligence and Analysis pursued an inappropriate relationship with a subordinate and misled investigators. TSA's Office of Professional Responsibility (OPR) recommended his dismissal. TSA leadership ignored OPR's recommendation and retained this Assistant Administrator with a lighter penalty. Minutes after he received OPR's Notice of Proposed Removal, the Chief Counsel's Office offered the Assistant Administrator a settlement agreement containing a 14-day suspension and a demotion with no loss in pay. He accepted.

¹ *Examining Management Practices and Misconduct at TSA: Part II, Hearing before the H. Comm. On Oversight & Gov't. Reform*, 114th Cong. (May 12, 2016) (statement of Peter Neffenger, Adm'r, Transp. Sec. Admin.) [hereinafter *TSA Hearing Part II – Neffenger Statement*].

² *Examining the President's FY 2019 Budget Request for the Transp. Sec. Admin., Hearing before the H. Comm. on Homeland Security*, 115th Cong. (Apr. 12, 2018) (statement of J. David Cox, Sr., Nat'l Pres., Amer. Fed. Of Gov't Employees).

³ Partnership for Public Service, "Best Places to Work Agency Rankings" (2017), available at <http://bestplacetowork.org/BPTW/rankings/overall/sub>.

The DHS Office of Inspector General (OIG) conducted its own investigation into TSA's disciplinary process. DHS OIG found, "TSA senior leaders deviated from standard policy and practice in a number of key respects indicating that [the Assistant Administrator] received unusually favorable treatment in the resolution of his disciplinary matter."⁴

In another example, OPR recommended the Deputy Assistant Administrator for the Office of Security Policy and Industry Engagement for removal. This Deputy Assistant Administrator was convicted of Driving While Intoxicated in January 2015. This TSA official sped the wrong way down a one-way street and struck and damaged several parked cars. She misled police by claiming she was not driving the car and falsely implicated a TSA aviation community stakeholder as the driver. Contrary to OPR's recommendation, TSA management offered the Deputy Assistant Administrator a settlement agreement containing a 14-day suspension. She accepted.

TSA's decision to mitigate the consequences of misconduct by senior officials contributed to the appearance of a double standard with respect to discipline. As one former TSA counsel testified, at a minimum, it "create[s] a perception of favoritism."⁵

TSA Used Involuntary Directed Reassignments as a Means of Retaliation

The Committee found senior TSA officials used involuntary directed reassignments to retaliate against disfavored employees, including whistleblowers. TSA inappropriately reassigned employees to new positions hundreds of miles from their stations without any discernable organizational need. Many of the reassignments caused considerable hardship on the affected employees due to financial and family obligations, forcing some to leave TSA altogether rather than accept the new post. Several TSA employees reported hearing senior officials discuss issuing directed reassignments as a means of forcing out disfavored employees.

A Federal Security Director (FSD), Jay Brainard, was directly reassigned from Iowa to Maine. Assistant Federal Security Director (AFSD), Andrew Rhoades, was directly reassigned from Minnesota to Florida.

In Brainard's case, he informed TSA the reassignment would cause his family severe hardship, but the agency refused to reconsider or offer him the accommodations he needed. Brainard moved to Maine, filed an Equal Employment Opportunity (EEO) complaint, and accepted a settlement to relocate to Kansas.

According to Rhoades, TSA management retaliated against him based on the false premise that he leaked security issues at the airport to the media. If Rhoades accepted the reassignment, it would have caused significant hardship including losing custody of his children. He filed complaints with the Equal Employment and Opportunity Commission and OSC. OSC intervened and blocked Rhoades's directed reassignment.

⁴ DEP'T. OF HOMELAND SEC. OFF. OF INSP. GEN., SPECIAL REVIEW: TSA'S HANDLING OF THE 2015 DISCIPLINARY MATTER INVOLVING TSES EMPLOYEE 16 (OIG-18-35) (Jan. 8, 2018).

⁵ Steven Colon Transcribed Interview 107-08, Dec. 07, 2016 (on file with the Committee) [hereinafter Colon Tr.].

TSA Reached a \$1 Million Settlement in the Case of Three Reassigned Employees

OSC reached a \$1 million settlement with TSA over the case of three Deputy Federal Security Directors (DFSDs) for retaliatory directed reassignments. Sharlene Mata, Heather Callahan Chuck, and Frank Abreu served as DFSDs at Honolulu International Airport. The DFSDs identified and reported significant operational deficiencies at the airport. All three DFSDs maintained a tense working relationship with the Honolulu FSD. Senior TSA managers reassigned the three DFSDs to the U.S. mainland. Employees going through a directed reassignment typically receive 60 days to report to the new post. However, the DFSDs in this case were concurrently issued temporary duty assignments requiring them to report to their new posts in four days over the Easter weekend. All three filed whistleblower retaliation complaints with OSC. In May 2018, OSC reached a settlement with TSA on behalf of the DFSDs, which restored Mata and Abreu to positions in Hawaii in addition to \$1 million in total compensatory damages.

TSA and DHS Obstructed Investigations into TSA Misconduct and Retaliation

In May 2016, former Administrator Peter Neffenger testified he would rely on the results of OSC's investigations into allegations of whistleblower retaliation to determine whether to impose discipline. However, TSA subsequently refused to provide OSC with unredacted documents necessary to complete its review of the retaliation cases. At the direction of DHS's Office of General Counsel (OGC), TSA claimed these documents were protected attorney-client communications. TSA's obstruction impeded OSC's investigations.

During the Committee's March 2, 2017 hearing, then-Acting TSA Administrator Huban Gowadia testified about the decision to redact and/or withhold documents from the DHS Acting General Counsel, Joseph Maher. After DHS refused to show the documents it was withholding from OSC to the Committee, a subpoena was issued to compel the production of the documents in question. Although the Department continued to withhold the documents even in the face of a subpoena, the documents reviewed *in camera* by the Committee showed TSA's redactions were applied excessively, inconsistently, and without legal justification, thereby creating the appearance the agency was intentionally obstructing OSC's investigation.

In a January 18, 2018 bipartisan letter to Secretary Nielsen, the Committee requested a transcribed interview with then-DHS Acting General Counsel Maher and demanded the production of the full universe of documents covered by the subpoena. DHS and TSA refused.

TSA officials involved in wrongdoing remain in senior positions, a number of OSC whistleblower cases have yet to be resolved, and TSA and DHS OGC continue to obstruct the Committee's investigation. The Department's posture on oversight—especially on issues which threaten to undermine TSA's core mission—signals the underlying problems are not likely to be addressed by current leadership.

TSA must improve its culture. As one whistleblower testified, "TSA's problems are rooted in the areas of leadership and culture. Ours is a culture of misconduct, retaliation, lack of trust, cover-ups and the refusal to hold its senior leaders accountable for poor judgment and

malfeasance.”⁶ For a myriad of reasons, including the safety of our country and her citizens, TSA must do better. The Department’s Office of General Counsel is currently standing in the way of that effort.

⁶ *Examining Management Practices and Misconduct at TSA: Part I, Hearing before the H. Comm. On Oversight & Gov’t. Reform*, 114th Cong. (Apr. 27, 2016) (statement of Andrew Rhoades) [hereinafter *TSA Hearing Part I – Rhoades Statement*].

II. Senior TSA Officials Engaged in Misconduct

Through the course of their investigations, both the Committee and the Department of Homeland Security (DHS) Office of Inspector General (OIG) discovered a pattern of misconduct among current and former senior level managers. In one example, an Assistant Administrator committed offenses sufficient for removal from federal service. Other senior TSA officials, however, circumvented the normal disciplinary process to allow him to stay with minimal consequences. Similarly, other TSA managers and leaders faced consequences not commensurate with the severity of their misconduct.

A. An Assistant Administrator Committed Removable Offenses but TSA Senior Leadership Intervened to Allow Him to Stay at TSA

Based on an anonymous complaint received on December 10, 2014, TSA's Office of Inspection (OOI) launched an investigation into the Assistant Administrator for the Office of Intelligence and Analysis. OOI's investigation found he committed misconduct including engaging in inappropriate behavior with a female employee, misusing his position during the hiring process, and lacking candor with investigators.⁷ TSA's Office of Professional Responsibility (OPR) recommended this official be dismissed based on these findings.⁸ Despite this recommendation, senior TSA officials intervened to offer him a less severe punishment.

1. The Assistant Administrator for the Office of Intelligence and Analysis Engaged in Inappropriate Behavior Towards a Female TSA Employee

During the summer of 2014, a mentor-mentee relationship developed between the TSA Assistant Administrator and a female TSA employee. The relationship became inappropriate when the Assistant Administrator, the mentor, vocalized feelings for the mentee beyond those of friendship.⁹ The mentee, described their relationship to investigators:

We maintained this friendship through the summer of 2014, at which time I began to suspect [he] had developed feelings for me beyond those of a platonic relationship. These feelings were unreciprocated, and [he] and I went to lunch with a third party, [redacted name], to address the issue. At lunch [he] admitted to having feelings for me beyond those of friendship, at which point I told him, in the presence of [redacted name], that our relationship would never evolve into anything other than the friends that we had become.¹⁰

⁷ U.S. DEP'T OF HOMELAND SEC., TRANSP. SEC. ADMIN., REPORT OF INVESTIGATION, I150026, 5 (2015) [hereinafter ASS'T ADM'R REPORT OF INVESTIGATION].

⁸ Memorandum from Donna Rachuba, Unit Chief, Office of Professional Responsibility, Transp. Sec. Admin. to Assistant Adm'r, Office of Intelligence Analysis, Transp. Sec. Admin. OPR 15-5087, *Notice of Proposed Removal* (June 15, 2015) [hereinafter *Ass't Adm'r Notice of Proposed Removal*].

⁹ *Id.*

¹⁰ *Id.* at 25.

That fall, the Assistant Administrator's behavior escalated. Colleagues of the female employee stated she told them he was contacting her frequently, day and night, about problems with his home life.¹¹ If he called and she did not answer, the Assistant Administrator would text or email until she responded.¹² The female employee told OOI the Assistant Administrator had become upset with her and accused her of not being a good friend, because she was not being attentive enough to him.¹³ She stated the two went to lunch to address the issue, and he again discussed his feelings for her, but ultimately, said he understood she would never be more than a friend.¹⁴ She further stated, the Assistant Administrator sent her a sexually explicit e-mail the next evening, the content of which upset and angered her.¹⁵

¹¹ ASS'T ADM'R REPORT OF INVESTIGATION at 83–87.

¹² *Id.* at 83–87.

¹³ *Id.* at 25–28

¹⁴ *Id.*

¹⁵ *Id.* at 25–26.

It is 4:30 in the morning and my words just came to me so here goes:

- 1) Sorry for my breakdown yesterday, but I did need it. Am totally embarrassed and as you know am trying not to do or say anything stupid to react.
- 2) This is different than July
- 3) I am NOT leaving my marriage for [REDACTED] In July I could not say that but now I can. I am not leaving my wife and kid for you.
- 4) Sex, I have never nor will I *EVER* suggest sex in this relationship. It goes without saying that it is not because of a lack of interest on my part, but rather respect for not crossing the line. It would be too easy and cheap. Would like to add for comic relief that I would first shit my pants due to insecurities but guarantee that I could make you have an orgasm and I mean squirt like no one else has made you do. Its not because of my great body or genitalia but B/C I know you and am willing to bet most if not all men are approaching sex with you completely wrong. Can have that chat if you *EVER* want, above is the most sex talk I have *EVER* had with you, but I will confirm that I am not having sex with you!!
- 5) Not leaving wife, not having sex with you that leaves us to friendship. Make no mistake about it this argument is and was about friendship. If you want to be friends that talk occasionally and once in a blue moon grab a beer then ok I certainly can do that and would certainly need to readjust. I put most if not all of my friends in this category. In fact I believe I was that kind of friend to you when you were at FLETC, true? Maybe my error but I am NOT thinking of us like that. My next category would be someone like Kim. I talk occasionally, remain guarded on some level, but talk to her fairly open on most levels. I do not have a need to go to her house, or talk everyday or etc.... I wouldn't not drop everything for any crisis she was having. You get the point. Then there is your category which is solely owned by YOU. I have much higher expectations for this friendship than I have with any other. If you can't or don't want to be in this category then let's chat. If this is the category of friendship you want then I need you to step up your game a tad. I am a 100% complete open book with you, Love you, care about you, and yes I said am not afraid to say it *EVER* though it pisses you off I will demand things from you on occasion and those things are your complete and unwavering trust, honesty, loyalty, commitment and I will demand that you be there for me within reason. So far I feel I have been reasonable. I have you in this category but not sure you have me in this category. And that is the discussion I wanted to have these past few days. I also realize when you find a significant other I need to *MOVE* you out of this category, we will deal with that when it comes and I will definitely need your help transitioning.

Hope this helps. Also wanted to share something with you: Do not freak out but check out the definition of Love on google I pasted below. I have it for you, certainly the 2 nouns, maybe not the verb.

I read this definition before I said it to you and wanted you to understand it. Its straight from Google the cut and paste didn't work so well, but included it anyway. Please Google it on your own time for yourself "definition of Love" and look at what comes up first it reads better than below:

I hope this helps and we can proceed. Happy to discuss further if need be. I love you! [REDACTED]

The female employee told investigators, “[he] then added an inappropriate reference, which he referred to as comic relief. . . . The comment in conjunction with his recent behavior made me angry, so we had an argument, during which I expressed my exasperation.”¹⁶

The female employee further stated the Assistant Administrator apologized and offered to resign.¹⁷ She believed his resignation was unnecessary, but asked him to leave her alone for the foreseeable future.¹⁸ According to the female employee, the Assistant Administrator next spoke with her to inform her he would be the new Assistant Administrator of TSA’s Office of Intelligence Analysis, where she worked, and asked if she was uncomfortable with this. She stated she “did not give him much of an answer at the time.”¹⁹ He continued to approach her in ways that made her uncomfortable after this encounter, but before he formally assumed the OIA position.²⁰ On November 24, she emailed a coworker stating “I’ve been visited twice already this morning. I’m very uncomfortable.”²¹ The Assistant Administrator disclosed this encounter to multiple coworkers, and even emailed her mother, writing “I already got my first visit. He asked me to go to lunch. I said no, and he got pissy. So we have to have another ‘talk’ today.”²² That afternoon she emailed him stating, “I’m sorry but I can’t [*sic*]. No more synching, texting, emailing or visits. You are AA [], and I am [*sic*] a J-band here at TSA.”²³ She further stated, “I have kept all of your other secrets, and will continue to do so. So, please no more communication.”²⁴

On March 12, 2015, OOI interviewed the Assistant Administrator about the allegation of an inappropriate relationship. The Assistant Administrator repeatedly told investigators there was “nothing sexual” about his relationship with the female employee, stating he viewed her as a “teenage daughter.”²⁵ He stated he had never asked for the relationship to be more than friendship, and he had never engaged in sexual conduct with or written sexual things to her.²⁶

When OOI presented the Assistant Administrator with a copy of his sexually explicit email, however, he admitted he sent the message to the female employee. He also admitted they had discussed sex, the email was inappropriate, and they had gone back and forth about “we are not going to go sexual.”²⁷ The Assistant Administrator further admitted their relationship was inappropriate for the workplace.²⁸ He acknowledged in a sworn statement he had made “an inappropriate sexual comment,” but maintained their relationship was not sexual or romantic.²⁹ The Office of Inspection explained in its Report of Investigation:³⁰

¹⁶ *Id.* at 26

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 184

²² *Ass’t Adm’r Notice of Proposed Removal* at 4; ASS’T ADM’R REPORT OF INVESTIGATION at 186.

²³ ASS’T ADM’R REPORT OF INVESTIGATION at 187.

²⁴ *Id.*

²⁵ *Id.* at 33–34.

²⁶ *Id.* at 34.

²⁷ *Id.* at 34–45.

²⁸ *Id.* at 35.

²⁹ *Id.* at 39–40.

³⁰ *Id.* at 8.

The email contains sexually explicit language directed toward [REDACTED]. In the first part of your March 12, 2015 interview, you denied sending [REDACTED] any sexual communications. You also claimed that you had never wanted the relationship you had with [REDACTED] to be anything more than friendship, but the email that you sent to [REDACTED] details the “love” that you feel for her and expresses that in July 2014, you might have left your wife and child for [REDACTED]. The Google definition of “love” that you sent to [REDACTED] is further evidence that your feelings for [REDACTED] went well past “friendship.”

The Assistant Administrator admitted to the Committee he knew the relationship was inappropriate long before his interview with OOI, but did not disclose his conduct to OOI investigators.³¹ He testified:

Q. So when you say you suspected, what precisely did you suspect prior to March 12th? [The start of the OOI investigation]

A. Well, the first thing I noticed was when [name redacted] ceased all communications for no reason around March 8th. That was my first indication. I mean, we were on good terms, talking, and then it just stopped. So at that point I pretty much assumed something was up.

Q. Did you have any guesses as to what was up, to use your words?

A. I certainly thought the possibility of an investigation the day she stopped talking to me.

Q. Why would you think that there would have been an investigation?

A. Because I knew – I mean, my relationship was not right.

Q. So you knew at that time your relationship was inappropriate?

A. I believe it was, yes.

Q. When did you first arrive at that understanding?

A. When I got told I was going to OIA, I knew I had a problem.

Q. What was the time frame of that?

A. November 21st, 2014, approximately.

Q. So did you do anything to act upon that knowledge that there was a problem?

³¹ Ass’t Adm’r Transcribed Interview 119–21, Apr. 2016 (on file with the Committee) [hereinafter Ass’t Adm’r Tr.].

A. I did. Not enough, but I went to [name redacted], and I told her that there's a potential that I'd be reassigned to OIA and for the first time she would be in my chain of command. I had indicated that I need to report it. She said – well, I asked her, do you have any concerns if I come in as your chain of command. She said no. I said, I need to report it. And she said, I wouldn't do that. I'm close to leaving OIA and going to training so why bother? And I incorrectly did not report it.

Q. So you didn't report at any time between November of 2014 and March of 20 – the first of March, we'll say, of 2015?

A. Right. The first time I said anything to my supervisor was actually the morning of my interview.³²

The Assistant Administrator also claimed to OOI investigators he had disclosed his relationship to Acting Deputy Administrator Mark Hatfield, his direct supervisor at the time, and Acting Administrator Melvin Carraway, his direct supervisor in December 2014.³³ Both Hatfield and Carraway told investigators the Assistant Administrator never disclosed any friendship or relationship with this subordinate.³⁴ In fact, the Assistant Administrator admitted he only told Hatfield the morning of his interview with investigators. He stated:

The fact that they said I did not discuss this with Acting Deputy Administrator, Hatfield, that is true. I said I discussed it with him. They interviewed Mr. Hatfield on March 4th. As of March 4th, I did not have a conversation with him. I spoke to Mr. Hatfield on the morning of March 12th about my relationship with [name redacted]. Now, to be candid, the afternoon of March 12th I got pulled in for the interview. But when I said in that interview – they said have you talked to Mr. Hatfield about this, I said, yes, I have. I talked to him that morning about it. But when they interviewed him on March 4th, I had not spoken to him about it.³⁵

Hatfield and Carraway both denied this happened.³⁶ Hatfield testified:

Q. When did [the Assistant Administrator] reveal to you his relationship with [name redacted]?

A. You know, I don't – when you say reveal his relationship, I don't know that he ever said, you know, "I'm revealing my relationship with [name redacted]." I think that in context of conversations

³² *Id.*

³³ *Ass't Adm'r Notice of Proposed Removal* at 9–10.

³⁴ *Id.*

³⁵ *Ass't Adm'r Tr.* 104.

³⁶ *ASS'T ADM'R REPORT OF INVESTIGATION* at 61, 63.

where early on we knew he was under investigation, and he would occasionally make declarative statements about his innocence or, you know, he had done nothing wrong in relation to her.

So I'm not sure that there was really any other – any disclosure of relationship. And it was an assumption that I knew what the allegations were, and he would declare his innocence.³⁷

The Assistant Administrator testified he did not disclose to investigators when he talked to Hatfield about the relationship. He stated:

A. I mentioned that I mentioned it – I disclosed it to my previous supervisor, John Halinski. I mentioned it to Mark Hatfield. And I said I may or – I said I can't – I said I possibly mentioned it to – well, it should be right in here –

Agency Counsel. You have a supplemental two pages.

A. The third one was . . .

Q. There was a third individual; is that correct?

A. Yes. I said something like I may have – may have or possibly mentioned it to Mr. Carraway.

Q. Did you describe when you disclosed it to Mr. Hatfield?

A. I did not.

Q. Did you see it as relevant at all that it had been that same morning?

A. I did not disclose when I talked to Mr. Hatfield about it.

* * *

Q. Can you describe to us why you failed to disclose it?

A. I thought it would look disingenuous.

Q. Okay. Do you believe that it was disingenuous to disclose or to communicate that you had disclosed it without providing the time frame?

A. Yes.³⁸

³⁷ Mark Hatfield Transcribed Interview 58–59, Feb. 23, 2017 (on file with the Committee) [hereinafter Hatfield Tr.].

³⁸ Ass't Adm'r Tr. at 148–49.

Carraway told OOI investigators the Assistant Administrator never disclosed to him he had a relationship with a subordinate.³⁹ Carraway also explained he was in fact the Assistant Administrator's supervisor at the time this was happening and the Assistant Administrator was ultimately reassigned to the Office of Intelligence and Analysis.⁴⁰

Another senior TSA official stated the Administrator asked him to lie on his behalf about the alleged sexual harassment of a different female subordinate TSA employee.⁴¹ Mark Livingston, a program manager with the Chief Risk Officer at TSA, testified the Assistant Administrator attempted to coerce him into lying to investigators. Livingston stated:

When I told [the Assistant Administrator] after he sexually harassed my executive assistant, he told me if I didn't lie for him that I was going to be on his "S" list. And then when I told him that I would not lie after he sexually harassed her, he told me that if I didn't, him and the others couldn't work with me.

What that meant to me was everybody else was covering for everybody else. They all circled the wagon. And I didn't want to be a part of it. This was the third time that I had known [he] to be part of something tawdry. They were mostly all dirty. I didn't want to be a part of it. And he made it clear to me that if I wasn't going to be part of the dirtiness of the other SES's, then they were going to shun me. I didn't think that was a big deal. I figured it was just him, but it was everybody.⁴²

Documents and testimony show the Assistant Administrator pursued an inappropriate relationship with a subordinate and sent explicit communications to her. He then misled OOI investigators about the nature of the relationship until he was presented with the sexually explicit email.

2. *The Assistant Administrator Abused His Authority and Position*

During the summer of 2014, the Assistant Administrator violated TSA hiring practices by hiring an individual outside the competitive process.⁴³ His office posted an open position for a K-Band Executive Advisor.⁴⁴ The individual he wanted for the position applied but was not selected for the Best Qualified list. Witnesses indicated the Assistant Administrator was "notably disappointed" when his preferred candidate did not make the certification list.⁴⁵

³⁹ ASS'T ADM'R REPORT OF INVESTIGATION at 63.

⁴⁰ *Id.*

⁴¹ Mark Livingston Transcribed Interview 39, Apr. 5, 2016 (on file with Committee) [hereinafter Livingston Tr.].

⁴² *Id.*

⁴³ *Ass't Adm'r Notice of Proposed Removal* at 11–13.

⁴⁴ *Id.*

⁴⁵ *Id.*

Susie Williams, then the Director of the Business Management Office within the Office of Inspection, worked closely with the Assistant Administrator throughout the hiring process.⁴⁶ She testified how he went around proper protocol. She stated:

Q. Do you recall [the Assistant Administrator] asking you whether he had the authority to approve a noncompetitive promotion instead?

A. Yes.

Q. What was the conversation like?

A. He asked if he could noncompetitively promote [name redacted] into the executive adviser position and asked for the cite policy reference, which then I provided.

Q. So, in a situation like this, would he have had to close the vacancy and then open up a new one?

A. You would close out the certificate, the competitive vacancy announcement, as non-selectees, and then reissue a 52, a new personnel action.⁴⁷

Williams explained the announcement was prepared correctly for an Executive Advisor and she advised him to interview the applicants who made the certification list.⁴⁸ The interviews were scheduled for 10-15 minute blocks with him alone.⁴⁹ According to Williams, this was unprecedented. She testified:

Q. Your testimony indicates that 10- to 15-minute blocks for interviews, quote, “was unprecedented,” end quote. Why was this unprecedented?

A. Because it’s never happened before.

Q. How do you know that it’s never happened before?

A. It hasn’t happened while I was – from the information that I know about, for the recruiting in our office.

Q. Do you know why the meetings were scheduled in such short blocks?

⁴⁶ See generally Susie Williams Transcribed Interview, May 20, 2016 (on file with Committee) [hereinafter Williams Tr.]; see also Ass’t Adm’r Notice of Proposed Removal at 11–13.

⁴⁷ William Tr. at 37.

⁴⁸ *Id.*; see also ASS’T ADM’R REPORT OF INVESTIGATION at 95.

⁴⁹ ASS’T ADM’R REPORT OF INVESTIGATION at 95.

A. I don't know.

Q. Did [the Assistant Administrator] keep meeting notes?

A. No.⁵⁰

After the interviews, the Assistant Administrator indicated none of the candidates was right for the job, and instead, promoted his preferred candidate through a non-competitive process.⁵¹ He assigned her fewer duties than an Executive Advisor would normally have received, leaving the leftover work to the other Executive Advisor and directors.⁵² OOI found he attempted to “clear the air” and explain to the OOI Advisory Group why he chose the individual as Executive Advisor outside the normal processes.⁵³ He explained he was never looking for a subject matter expert—even though the job necessitated it—but was instead looking for a scheduler.⁵⁴ The hiring of a Program Assistant went similarly. Williams testified:

Q. Do you have any recollection of the hiring of a program assistant by the name of [name redacted]?

A. Yes.

Q. Can you kind of describe the process through which she was hired?

A. [The Assistant Administrator] wanted to bring her over, noncompetitive reassignment. It's not a promotion. We didn't have a position that was available, a cover sheet that was established, like a PD. So we had to go through the position classification review process, which we did, and the outcome was a secretary position.

And she was initially provided a tentative offer, which was then later declined by [name redacted]. And then ultimately a reclassification, a new discussion occurred regarding the position, and then she was placed into the position.

Q. Was that unusual in any way?

A. It wasn't unusual except for that just the manager didn't want a secretary position for the position, for the classification of the position.

Q. Did [name redacted] end up serving in the capacity as a secretary?

⁵⁰ William Tr. at 81.

⁵¹ ASS'T ADM'R REPORT OF INVESTIGATION at 6; *Ass't Adm'r Notice of Proposed Removal* at 11–12.

⁵² ASS'T ADM'R REPORT OF INVESTIGATION at 95–96.

⁵³ *Id.* at 11–12.

⁵⁴ *Id.*

- A. As a program assistant position, was the final classification.
- Q. That was the classification, but in terms of duties, was she acting more like a program assistant or –
- A. Yes.
- Q. So she actually did perform duties more like a program assistant.
- A. Yes.
- Q. What was [the Assistant Administrator’s] reaction when the description was returned as a secretary?
- A. He said he didn’t want that position – didn’t want that position to be classified as a secretary.⁵⁵

There is also evidence the Assistant Administrator used his position to influence other’s opportunities. One federal law enforcement officer with TSA explained in her sworn statement to investigators, “I was afraid to state my dissatisfaction of not getting the position. [The Assistant Administrator] has a reputation for getting what he wants and he knows many people. I was afraid my action I took would result in retaliation.”⁵⁶

The Executive Advisor for the Office of Inspection noted in her statement to investigators regarding the executive advisor job search, “[t]he selection of [name redacted] by [the Assistant Administrator] caused a negative impact . . . ; I was a witness to many conversations regarding her lack of knowledge and experience, and the perception [he] selected her as a favor to the Front Office/John Halinkski [*sic*] [Deputy Administrator].”⁵⁷ She also told OOI investigators:

On June 3, 2014, at the OOI All Hands Meeting, [the Assistant Administrator] announced that he was not initially going to make any changes so that he could determine if anything needs to be fixed. He then stated that he was bringing (redacted) into OOI on a detail to be his Executive Advisor and (redacted) on a detail as his Executive Assistant. [The Assistant Administrator] stated that both of them would work directly for him. After the All Hands meeting, a handful of people asked me if I had lost my position as Executive Advisor.⁵⁸

The Executive Advisor went on to explain how the decision to hire both these individuals presented problems within the office. She testified to OOI:

⁵⁵ Williams Tr. at 45–46.

⁵⁶ ASS’T ADM’R REPORT OF INVESTIGATION at 128–29.

⁵⁷ *Id.* at 148.

⁵⁸ *Id.*

In mid-June 2014 (approximately), (redacted) started a 90-day detail in the AA Executive Advisor position. After I introduced myself to her, she told me that she started with the Office of Global Strategies and worked there for several years, and spent one year with the TSA's Front Office. When asked, she told me that she had not worked for [him] previously. I believe that (redacted) began working in OOI around the same time frame; she told me that she worked in the Office of Security Operations. During (redacted) and (redacted) tenure with OOI (June 2014 - early December 2014), whenever they entered [his] office, the door would always be closed.⁵⁹

In the Assistant Administrator's Notice of Proposed Removal, OPR stated his "action in posting and selecting for a position at the K band, based on its stated duties and responsibilities when [he] knew they were not the duties and responsibilities to be performed is inappropriate and unacceptable."⁶⁰ OPR further stated the actual duties and responsibilities of the position "would never sustain a K-band classification if reviewed."⁶¹

Documents and testimony show the Assistant Administrator ignored the proper hiring process and chose to personally select individuals he wanted in those positions. Additionally, after hiring one particular individual, he removed a significant portion of that person's workload and passed it on to others.

3. OPR Recommended the Assistant Administrator be Dismissed from TSA

TSA Acting Deputy Administrator Mark Hatfield testified the final decision to propose the Assistant Administrator for removal came from Heather Book, Assistant Administrator for OPR. Hatfield stated:

Q. You mentioned you didn't recall how you found out about the notice of proposed removal for [the Assistant Administrator]. To clarify, do you know who had communicated that with you?

A. It was either Heather Book or [Chief Counsel] Francine Kerner.

Q. Do you recall who made the decision to propose [his] removal?

A. That would be Heather Book, because that's her role as the head of that office. So she takes it, you know, as I said, she fields – she staffs the cases, and then the case officer, I don't – I don't know what happened behind the curtain, but they process it somehow and they – I think they're all attorneys. So they then forward it back to her, and I think they recommend to her, and then she either accepts

⁵⁹ *Id.*

⁶⁰ *Ass't Adm'r Notice of Proposed Removal* at 13.

⁶¹ *Id.*

or modifies that recommendation and then forwards it to the deputy administrator.⁶²

Hatfield believed the proposal for removal was a severe punishment—perhaps too severe—for the Assistant Administrator. He testified:

Q. So I just want to be clear here, looking at exhibit 3, the policy states again, “In accordance with TSA’s personnel security program, supervisors must report any information that raises doubts about an employee’s continued eligibility for TSA employment or security clearance such as access to sensitive information.”

Here, you’ve just been presented with a notice of proposed removal that indicates he, [the Assistant Administrator], exhibited poor judgment, he exhibited a lack of candor, he was untruthful in responses given to the Office of Investigation. Why doesn’t this rise to the level of something that under TSA’s policy a supervisor must report for review by the personnel security program?

A. It’s a reasonable question, and this is black and white. It’s all in writing. And when you sit in Solomon’s seat and you’ve got to make decisions about people’s lives, you take into account the totality of the situation, the specifics of the individual case, and I made my decision at that time. And I stand by it today. I’ll take ownership of it. If you have a problem with that, proceed accordingly.

I know there’s a lot of people who had a lot of animus for [him]. I was agnostic. I thought that he was a young man with potential. I think that he served his country honorably in the United States Marine Corps. And I think that he, unfortunately, had some bad supervisors who – you know, he learned a way of doing business there – I’d like to finish – he had a way of doing business there that was a little roughshod.

And I think that in the course of all of this he faced termination, he suffered severe discipline. And I stand by my assessment of the case that he was a young man with potential for rehabilitation and deserved the punishment, but also deserved a chance to be rehabilitated. That’s the best I can offer you.⁶³

Pursuant to TSA’s process, a deciding official ultimately determines the discipline, taking OPR’s proposal into consideration. Steven Colon, the former Assistant Chief Counsel for

⁶² *Id.*

⁶³ *Id.* at 88–89.

Administrative Litigation in the Office of Chief Counsel, testified how TSA determined the deciding official. He testified:

Q. In [the Assistant Administrator's] case, who was the deciding official?

A. I don't even know at this point. So the assigned deciding official I believe was going to be Mr. McShaffrey, the deputy assistant administrator of OPR.

Q. And how was the assignment formalized?

A. It is actually formalized in the proposing – the proposal notice. In the proposal notice, you will indicate who the deciding official is and, you know, how to contact them and set it up. So that, to me, is the official document saying, okay, this person is your deciding official because you're delivering it to the employee.

How that was worked out by Ms. Book and Mr. McShaffrey and anyone else who may have had any involvement in that decision, that I do not know.⁶⁴

At the time, General Francis Taylor had been Acting Administrator of TSA for three weeks and wanted to be involved in any personnel decision.⁶⁵ TSA Chief Counsel Francine Kerner told the Committee about her conversation with General Taylor. She testified:

What happened with this case was – this was during a period of transition, so we had the removal notice all written up and ready to go. Mark Hatfield was then the Deputy Administrator. General Taylor was named the Acting Administrator after Mel Carraway had been removed.

Shortly after General Taylor came on board – and he's a formidable presence – there was a meeting called in his office. I didn't call the meeting. The meeting was called by General Taylor. At that meeting was Mark Hatfield, General Taylor, Heather Book, and me. General Taylor made it very clear that he wanted to be – emphatic, he was emphatic, “Don't I have a say?” And he was well aware of the facts, and he had an opinion, and his opinion is the one that I shared with you, that he had worked with [the Assistant Administrator], that he thought highly of his work, that this was a matter of the heart, that

⁶⁴ Colon Tr. at 143.

⁶⁵ TSA briefing to Committee staff; Briefing by General Francis Taylor, Transp. Sec. Admin., Adm'r, to staff, H. Comm. on Oversight & Gov't Reform (Apr. 21, 2016) [hereinafter General Taylor briefing] and briefing by Transp. Sec. Admin. to staff, H. Comm. on Oversight & Gov't Reform (May 3, 2016) [hereinafter May 3, 2016 TSA briefing to Committee staff].

there was no question in his mind that [he] could be rehabilitated, and that he did not want [him] removed.⁶⁶

According to the DHS OIG, this meeting took place on or around June 12, 2015, approximately one week after Taylor had assumed the role of Acting Administrator.⁶⁷ In the meeting, Book strongly supported removing the Assistant Administrator while Hatfield supported a lesser penalty.⁶⁸ Kerner told the DHS OIG she agreed with Hatfield's position, but did not explicitly state this at the meeting.⁶⁹ Taylor ultimately decided the Assistant Administrator's offenses were a "crime of emotion" and did not warrant removal, but instead should be penalized by relieving him of his leadership position and reassigning him.⁷⁰ The decision to mitigate the Assistant Administrator's punishment led to a series of unusual actions inconsistent with TSA's normal disciplinary process.

Originally, Scott McShaffrey, the Acting Deputy Assistant Administrator of Office of Professional Responsibility, was to be the deciding official.⁷¹ Typically, if a conflict of interest arises in a case, the deciding official chooses whether to recuse himself.⁷² According to Kerner, McShaffrey had worked closely with the Assistant Administrator in the past, but determined there was no conflict.⁷³ On June 12, following the meeting with General Taylor, Book asked McShaffrey to take Donna Rachuba's place as proposing official and issue the Assistant Administrator a 14-day suspension and directed reassignment.⁷⁴ McShaffrey stated he was uncomfortable with this request, because as the designated deciding official, he had been walled off from the process and had not had the opportunity to independently review the facts of the case.⁷⁵ McShaffrey found the handling of the case unusual enough to begin keeping private contemporaneous notes of the matter. Book then requested Rachuba to change her recommendation, which she refused to do.⁷⁶ According to Book, Hatfield, who as Acting Deputy Administrator was also her supervisor, eventually asked Book to name him the deciding official instead of McShaffrey—even though Hatfield had previously worked under the Assistant Administrator.⁷⁷ Hatfield stated:

Q. Were you aware that Scott McShaffrey was the name of the deciding official on the draft notice?

A. Now that you remind me, I do.

⁶⁶ Francine Kerner Transcribed Interview 75–76, Dec. 5, 2017 (on file with Committee) [hereinafter Kerner Tr.].

⁶⁷ DEP'T. OF HOMELAND SEC. OFF. OF INSP. GEN., SPECIAL REVIEW: TSA'S HANDLING OF THE 2015 DISCIPLINARY MATTER INVOLVING TSES EMPLOYEE 8–11 (OIG-18-35) (Jan. 8, 2018).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ May 3, 2016 TSA briefing to Committee staff.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Q. How did you find that he was the deciding official on [the Assistant Administrator's] case?

A. Just in the process, I would have been told that he was working on it. Yeah. So deciding – well, I don't recall all the terms of, you know, but I do know, as you mentioned his name, because I remember Scott was involved, yes.

Q. Was it customary for Mr. McShaffrey to – or somebody else from OPR to be the deciding official in OPR cases?

A. I didn't have enough context to tell you what was custom or not. You know, I was taking it step by step as an individual case. And only in hindsight can I look back and say, okay, yeah, I mean, the other cases kind of fell along the same way. I didn't have a year or 2 or 3 of experience doing this. So –⁷⁸

* * *

Q. So you would typically, after recommendation from, say, McShaffrey, you would sit down and look at it and decide whether–

A. And I almost always dealt with and really only recall, Heather in terms of my direct. I mean, I saw McShaffrey on a regular basis, but typically Heather would represent that Office.

Q. But after there was a recommendation, typically you and Francine Kerner and Heather Book would decide whether the case had been more straightforward and cut and dry?

A. Or whether it needed more attention.⁷⁹

Hatfield testified he did not view himself as the deciding official, although he understood his role in the matter effectively rendered him the “de facto” deciding official. He stated:

Q. Would anybody else have considered you to be the deciding official on [the Assistant Administrator's] case?

A. You know, using that as the term of art, possibly, yeah.

Q. And why would you say possibly if you just said that that was not your position?

A. Well, I signed it, because that was my role as the deputy, to sign the

⁷⁸ Hatfield Tr. at 32–33.

⁷⁹ *Id.* at 38–39.

final documents, but the decision was made with that group of four and, ultimately, the final decision was made by General Taylor, as I recall.

- Q. So you didn't have any discussions about being formally placed in the position of deciding official or named the deciding official for [his] case or any other case that you were a part of?
- A. Well, by signing that, I was de facto – I mean, I signed it, so that made the decision.

By the way, I supported this decision. I have no reluctance in telling you that, you know, in looking at the full scope of this case, I thought it was an appropriate disciplinary action. I thought it was a severe disciplinary action. He was suspended without pay. He was demoted three levels down, although – and he was taken out of the SES.

So I'm not in any way trying to distance myself from that. It's just the formal terms and roles, which I am going to beg for some latitude here that I don't have the ability to give you, you know, real definitive answers. I certainly signed the final document, but I will go back and say that the decision was made with that group of four people.⁸⁰

Book informed the Committee she had expressed concerns to Hatfield about a potential conflict of interest because he previously worked as a Federal Security Director under the Assistant Administrator.⁸¹ Hatfield dismissed her concerns and effectively made himself the deciding official.⁸² According to Book, this had never happened before.⁸³

On June 15, 2015, Scott McShaffrey delivered the Notice of Proposed Removal to the Assistant Administrator.⁸⁴ The proposal detailed four substantiated charges and their penalty range under the TSA *Table of Offenses and Penalties*.⁸⁵ The proposal detailed how he committed multiple offenses, and the lack of candor charges were aggravating factors in determining the penalty.⁸⁶

⁸⁰ Hatfield Tr. at 46–47.

⁸¹ May 3, 2016 briefing to TSA Briefing to Committee staff.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Ass't Adm'r Tr. at 162.

⁸⁵ See generally Ass't Adm'r Notice of Proposed Removal.

⁸⁶ *Id.* at 14.

I noted the clarity with which you were on notice of the applicable policies. On November 7, 2014, your Online Learning Center Records indicate that you read and understood TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*. I also note that you acknowledged TSA's Code of Conduct and Leader's Pledge, in which you pledged to be honest at all times, whether on or off-duty. You therefore knew or should have known of your responsibility to provide accurate and complete information during an investigation, the appropriate use of government email. Your actions, however, have caused irreconcilable doubts about your reliability, judgment and trustworthiness.

Under the aggravated penalty range, his four charges made him eligible for removal.⁸⁷ Lack of candor alone has a recommended penalty of removal.⁸⁸

Under TSA guidelines, the Assistant Administrator had seven days to submit an oral and/or written reply, which would then be considered by the Deciding Official to determine whether to sustain or mitigate the proposal.⁸⁹

Other TSA officials learned of TSA's handling of this case and were troubled by the agency's failure to remove him and viewed it as evidence of a double standard in discipline for senior officials. Mark Livingston testified he believed the Assistant Administrator should have been removed based on TSA's own investigation. He stated:

Q. You are referencing the ROI?

A. The result of the investigation for [the Assistant Administrator] from the Office of Inspection. In it there were three clearcut case[s] of lying from our inspector general. He was reduced from SES to L-Band. That's it.

Q. What does the Table of Penalties recommend for lack of candor?

A. The investigator recommended termination. The Office of Personnel Responsibility recommended termination. The Office of Chief Counsel recommended termination. But when it got to the head front office, either the deputy or the acting administrator didn't do it. And when Mr. Neffrenger (sic), the administrator got it, his answer was, "Well, it has already been adjudicated." You don't get a second bit (sic) of the apple. But what he didn't do is he didn't look at all the pending cases that are already there.

* * *

That's an example of what's wrong with TSA. When there is an airtight proven case as a result of an investigation that is proven, not

⁸⁷ *Id.*

⁸⁸ *Id.* at 14–15.

⁸⁹ *Id.* at 16.

alleged or an allegation, but proven when there is concrete airtight proof of an SES who has misconduct and there is not appropriate taken, it doesn't work.⁹⁰

The same sentiment was shared by Assistant Federal Security Director for Mission Support, Andrew Rhoades. He stated:

[The Assistant Administrator] was given a very, very, very light infraction. In his example there were three lack of candor charges sustained by our Office of Inspections and the Office of Professional Responsibility. According to our table of penalties, one lack of candor charge is mandatory removal from service. He had three.⁹¹

TSA investigators found the Assistant Administrator pursued an inappropriate relationship with a subordinate, lacked candor in an interview with investigators, and abused his authority in his position. The Agency's Office of Professional Responsibility investigated and recommended removal. Under proper protocol the deciding official should have been Scott McShaffrey, yet Acting Deputy Administrator Mark Hatfield requested to become the deciding official, even in the face of a conflict of interest. At that point, the Acting TSA Administrator, in collaboration with the Acting Deputy Administrator, Assistant Administrator of OPR, and Chief Counsel decided he would not be removed, instead offering him a simple settlement.

4. Minutes After the Assistant Administrator Received the Notice of Proposed Removal, Senior TSA Officials Offered Him a Settlement Agreement

On June 15, 2015, the same day the Assistant Administrator received the Notice for Proposed Removal, TSA counsel Steve Colon presented him with a settlement agreement. Hatfield, Heather Book, the Assistant Administrator of OPR, and the Assistant Administrator all signed the agreement on June 18.⁹² The settlement rejected the recommendation to terminate him.⁹³

Colon drafted the settlement agreement at the behest of Francine Kerner. Colon testified he met with the Assistant Administrator to offer him the settlement. He stated:

- Q. How did you learn that he was going to receive a notice of proposed removal?
- A. From my ultimate supervisor, the Chief Counsel, Francine Kerner, kept me after our usual meeting that we had on that – on Mondays at 11:00 a.m., and indicated to me that the Office of Professional Responsibility was going to serve a proposal for removal on [the

⁹⁰ Mark Livingston Tr. at 34–36.

⁹¹ Andrew Rhoades Transcribed Interview 97, Mar. 30, 2016 (on file with the Committee).

⁹² Settlement Agreement Between Ass't Adm'r and the Tranp. Sec. Admin. (Jun. 18, 2015) [hereinafter Ass't Adm'r Settlement Agreement].

⁹³ *Id.*

Assistant Administrator], but that the acting administrator, General Taylor, had determined that he wanted him to get – wanted him to stay on board. And so I was asked – I was told to meet with [the Assistant Administrator] to offer him a chance to take a settlement of the – of the proposed removal by taking the 14-day suspension and the loss of his position.

Q. When did you meet with [the Assistant Administrator] to have that discussion?

A. I met with [him] that afternoon on June 15th. I think it was around 3:00 p.m. He had already been visited by assistant – deputy assistant administrator of OPR, Scott McShaffrey, who delivered the proposal to remove him, to him in his office space, which actually is in a SCIF. Because he was head – at that time, [he] was the assistant administrator of the intelligence group at TSA. At that point – right, I think, either – I think right prior to Mr. McShaffrey delivering a letter to me, he forwarded me a copy – I had requested of him that he forward me a copy of the proposal notice, so I could read it before I met with [the Assistant Administrator]. Prior to that time, I did not have any involvement with either OPR or any of the agency attorneys who had been apparently working on the proposal notice. So I didn't know what was in it until I saw it.⁹⁴

The settlement penalized the Assistant Administrator with a 14-day suspension, removed him from the Senior Executive Service for one year, and reduced his grade.⁹⁵ The proposed settlement did not affect his salary, even though he was demoted a grade.⁹⁶

Acting Administrator Taylor never reviewed the Notice of Proposed Removal before TSA offered the settlement agreement.⁹⁷ He reviewed only a summary memorandum provided by Acting Deputy Administrator Hatfield.⁹⁸ Taylor conceded he was not aware the settlement agreement allowed the Assistant Administrator to retain his current salary level.⁹⁹

Colon believed the timing of the Assistant Administrator's settlement—within minutes of receiving the notice of proposed removal—was odd. He testified:

Q. I recall you mentioning in the last hour that you had told [the Assistant Administrator] that the lack of candor charge, if you took it to the MSPB, is one that, given his prior position in the agency, is not one that you felt TSA would lose?

⁹⁴ Colon Tr. at 94–95.

⁹⁵ Ass't Adm'r Settlement Agreement.

⁹⁶ *Id.*

⁹⁷ May 3, 2016 TSA briefing to Committee staff.

⁹⁸ *Id.*

⁹⁹ *Id.*

A. That is correct.

Q. Did you find it odd that [he], having faced this and three other charges, would be given the settlement that you ultimately drafted?

A. I found that it was odd that we would serve him with a proposed removal and then follow it up with a settlement. I just didn't think it made any sense. You know, if you are thinking this is what you want to do to him, why would you serve him with a proposed removal that you had no intention of following through with. You know, I didn't think that made any sense at all.¹⁰⁰

Additionally, Hatfield appeared to be the deciding official for the settlement agreement.¹⁰¹ This conflicts with Chief Counsel Francine Kerner's belief Hatfield was not the deciding official but was to settle the matter on behalf of TSA. She testified:

Q. The settlement agreement itself has Mark Hatfield as the deciding official.

A. Has Mark Hatfield as settling on behalf of the agency, which is a little bit different.

Can I just indulge you with a little bit of discussion of personnel of how the process works so that you understand how we got the settlement?

Q. Yes. Specifically, can you describe the parameters of what do you mean by personnel? Like in a disciplinary situation?

A. Yes, in a disciplinary situation.

Q. Okay.

A. Okay. So normally what happens when you've got – you've got the ROI, then you draft up whatever you think the proposal should be for discipline. If there is discipline. You may also give a letter of closure if you don't think the report shows that anybody did anything wrong.

* * *

In this case, the administrator – the acting administrator, General Taylor, had already decided that he did not want the removal

¹⁰⁰ Colon Tr. at 141.

¹⁰¹ Kerner Tr. at 83.

action to be completed. Now, if [he] had not agreed to the settlement of the case, which was a demotion and a suspension, he would have had to face the removal action. And something to consider also is that, both with regard to the removal and the demotion, [he] had a right to go to the Merit Systems Protection Board. So even if you had gone to a deciding official and you had had the deciding official decide that he would just get demoted, [he] still had the right to take that to the Merit Systems Protection Board.

So here you have General Taylor deciding there won't be a removal. And he understood the facts of the case very well from my observing what he said about [him] and what he said about the case.

Q. How do you think he became aware of the facts of the case?

A. Well, I know that he and Hatfield had a discussion about the case before we came in, because he started with a base of knowledge. And it was clear that Hatfield, who was deputy administrator, had talked to him.¹⁰²

Hatfield explained to the Committee he was the de facto signer for the settlement agreement—even though McShaffrey was the established deciding official as the Deputy Assistant Administrator of OPR. Hatfield stated:

Q. Would anybody else have considered you to be the deciding official on [the Assistant Administrator's] case?

A. You know, using that as the term of art, possibly, yeah.

Q. Any why would you say possibly if you just said that that was not your position?

A. Well, I signed it, because that was my role as the deputy, to sign the final documents, but the decision was made with that group of four and, ultimately, the final decision was made by General Taylor, as I recall.

Q. So you didn't have any discussions about being formally placed in the position of deciding official or named the deciding official for [the Assistant Administrator's] case or any other case that you were a part of?

¹⁰² Kerner Tr. 83–85.

A. Well, by signing that, I was de facto – I mean, I signed it, so that made the decision.

By the way, I supported this decision. I have no reluctance in telling you that, you know, in looking at the full scope of this case, I thought it was an appropriate disciplinary action. I thought it was a severe disciplinary action. He was suspended without pay. He was demoted three levels down, although – and he was taken out of SES.

So I'm not in any way trying to distance myself from that. It's just the formal terms and roles, which I am going to beg for latitude here that I don't have the ability to give you, you know, real definitive answer. I certainly signed the final document, but I will go back and say that the decision was made with that group of four people.

Q. Do you know why Mr. McShaffrey did not signed the settlement agreement?

A. I don't. I don't know whether it was normal protocol to then move on to ask him or whether there was some reason that he didn't do it. I was not aware of any.

Q. And, to clarify, I asked you if you had any communications about your role as the deciding official on [his] case, and you didn't really directly say yes or no.

A. I don't recall.

Q. Okay.

A. But no evidence of this, I was de facto the final signature.¹⁰³

The Assistant Administrator was given a Notice of Proposed Removal based on the investigation by OOI. The Notice explained the lack of candor allegation carried a punishment of up to removal. Multiple other substantiated allegations combined with the lack of candor charge should have resulted in his removal. Acting Administrator General Taylor, however, decided not to remove the Assistant Administrator based on Taylor's conversation with Hatfield, Kerner, and Book. Kerner then instructed Colon to draft a settlement agreement to present to the Assistant Administrator, presented the same day as the Notice of Proposed Removal.

¹⁰³ Hatfield Tr. 46–47.

B. DHS OIG’s Investigation Determined Senior Managers Deviated from Agency Policy Regarding the Assistant Administrator

At the Committee’s request, the DHS OIG investigated how TSA handled the Assistant Administrator’s misconduct and discipline.¹⁰⁴ On January 8, 2018, the DHS OIG released its report, confirming the Committee’s findings and concluding: “TSA senior leaders deviated from standard policy and practice in a number of key respects indicating that [the Assistant Administrator] received unusually favorable treatment in the resolution of his disciplinary matter.”¹⁰⁵

The DHS OIG discovered senior current and former TSA officials “interfered with the disciplinary process in a way that circumvented the very TSA policies and procedures that were established to prevent favoritism in such circumstances.”¹⁰⁶

According to the OIG, the Assistant Administrator’s case initially “proceeded along the normal course, with OOI investigating the allegations and OPR making a determination as to the appropriate charges to bring under the circumstances.”¹⁰⁷ OPR Unit Chief, Donna Rachuba, “followed standard procedure, and her analysis and conclusions were informed by the facts and guided by relevant TSA policies.”¹⁰⁸

Further, the proposed penalty (removal) appears to have been warranted—if not required—by TSA’s Table of Penalties. However, the insertion of senior leadership caused the process to “go off course.”¹⁰⁹ The OIG investigation released the following list—spanning eleven items—demonstrating the ways TSA senior officials improperly intervened or acted in the matter:

- DA Hatfield’s decision to circumvent the standard OPR process by involving General Taylor in the decision-making with respect to the TSES Employee’s penalty;
- DA Hatfield’s misleading suggestion to General Taylor that OPR had somehow exceeded its authority by proposing to remove a member of the TSES without senior leadership’s input;
- The failure by DA Hatfield, Chief Counsel Kerner, and AA Book to inform General Taylor—who was serving in an acting capacity and was entirely unfamiliar with TSA’s disciplinary policies and procedures—

¹⁰⁴ Letter from Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to Peter Neffinger, Adm’r., Transp. Sec. Admin. (Apr. 26, 2016) (The letter to Administrator Neffinger was forwarded to the DHS OIG to request the OIG initiate an investigation.); *See also* Letter from John Roth, Inspector Gen., Dep’t of Homeland Sec. Office of Inspector Gen. to Jason Chaffetz, Chairman, H. Comm. On Oversight & Gov’t Reform (June 23, 2016).

¹⁰⁵ DEP’T. OF HOMELAND SEC. OFF. OF INSP. GEN., SPECIAL REVIEW: TSA’S HANDLING OF THE 2015 DISCIPLINARY MATTER INVOLVING TSES EMPLOYEE 2 (OIG-18-35) (Jan. 8, 2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 13.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

that his involvement in the process was a deviation from standard practice and extremely unusual;

- AA Book’s decision to circumvent OPR’s standard process by directing an OCC attorney to revise the NPR to remove the lack of candor charge and propose suspension instead of removal;
- AA Book’s decision to circumvent and/or improperly influence OPR’s standard process and objective, independent decision-making by asking the ADAA to take the [Unit Chief’s] place as the Proposing Official and dictating to the ADAA what penalty he should propose (i.e., a 14-day suspension with a directed reassignment following the suspension);
- AA Book’s decision to circumvent and/or improperly influence OPR’s standard process and objective, independent decision-making by attempting to dictate to the UC what penalty she should propose (i.e., a 14-day suspension);
- AA Book’s decision to circumvent and/or improperly influence OPR’s standard process and objective, independent decision-making by replacing the ADAA with DA Hatfield as the designated Deciding Official;
- Chief Counsel Kerner’s efforts to circumvent OPR’s standard process by initiating settlement negotiations with the TSES Employee before he was even aware that the Agency was considering his removal;
- OCC’s failure to comply with TSA Management Directive 1100.55- 9, Settlement Agreements, which requires that TSA’s Executive Resources Council (ERC) be consulted on any settlement agreement to which a TSES employee is a party, and tasks the TSA OCC with coordinating such agreements with the ERC;
- DA Hatfield’s efforts to ensure that the TSES Employee could “save pay” despite his demotion; and
- Senior leadership’s efforts to achieve, by settlement, what it had failed to accomplish through its unsuccessful efforts to circumvent and/or improperly influence OPR’s standard process.¹¹⁰

Finally, DHS OIG discussed Chief Counsel Francine Kerner’s inability to fairly handle and adjudicate matters for the agency. The OIG explained:

¹¹⁰ *Id.* at 14–15.

Chief Counsel Kerner proposed several justifications for the special-handling of the TSES Employee’s case. First, she suggested that resolving the matter quickly via settlement saved the Agency money by ensuring the TSES Employee did not sit on paid administrative leave during the second phase of the disciplinary process (i.e., review by the Deciding Official).

* * *

Based on DHS OIG’s review of cases involving similarly situated TSA employees, senior leadership does not appear to regularly pursue such cost savings by circumventing OPR’s standard process. Accordingly, DHS OIG does not find this justification compelling.¹¹¹

Kerner told investigators she was concerned with the ways OOI and OPR functioned, claiming they had not fully developed the use of mitigating factors in their investigations. The DHS OIG found:

In particular, she noted that OOI does not always interview a subject’s supervisors to find out what kind of employee she or he is. Other witnesses echoed this concern. With respect to OPR, Kerner opined that the Agency had not devoted sufficient resources to OPR to make it the mature function it needed to be to properly adjudicate matters within its jurisdiction. According to AA Book, DA Hatfield echoed this concern to her – in particular, he had issues with the notion that a non-SES OPR employee could decide the professional fate of a member of the TSES without the input of senior leadership.¹¹²

The DHS OIG did not find Kerner’s justifications “compelling.”¹¹³ The OIG wrote: “[o]perating outside of, or inconsistently with, existing policies and procedures subjects the Agency to risk. Among other things, employing a shadow disciplinary process for senior management fuels complaints about unjustly favorable treatment for high-level employees.”¹¹⁴

C. TSA Senior Officials Continually Circumvented the Disciplinary Process to Avoid Repercussions for Their Actions

Other senior TSA Officials engaged in misconduct with minor—and in some cases, no—repercussion. The Committee received examples of senior level officials committing egregious acts of misconduct, being investigated for those acts, and then receiving a mild punishment not rising to the level required by the Table of Penalties. This pattern of mitigation allowed senior level managers at TSA to continue their misconduct, and consequently, decrease morale within the agency.

¹¹¹ *Id.* at 15.

¹¹² *Id.* at 16.

¹¹³ *Id.*

¹¹⁴ *Id.*

1. Deputy Assistant Administrator for the Office of Security Policy and Industry Engagement Drove While Intoxicated and Misled Police

On August 5, 2015, OPR issued a Notice of Proposed Removal to TSA's Deputy Assistant Administrator in the Office of Security Policy and Industry Engagement (OSPIE), for Driving While Intoxicated (DWI) and misleading police about whether she was the driver of her vehicle.¹¹⁵ On October 26, 2015, TSA reached a settlement with her granting her a 14-day unpaid suspension instead of removal from federal service.¹¹⁶

The Deputy Assistant Administrator was arrested and charged with a Refusal of Breath Alcohol Test.¹¹⁷ According to the Notice of Proposed Removal (NPR), she was arrested after police officers "responded to a report of a white vehicle speeding the wrong way on a one-way street."¹¹⁸ Police officers subsequently found her vehicle "parked facing westbound on the side of the one-way eastbound road with a person seated in the passenger seat."¹¹⁹ The Deputy Assistant Administrator's vehicle "was on the curb and it appeared to the police that it had sustained significant damage to the passenger side and that the front wheel base and axle were broken making the car inoperable."¹²⁰

OPR found, the Deputy Assistant Administrator "provided misleading and inconsistent information to police officers concerning who was driving her vehicle at the time of the offense, and how and when her vehicle was damaged."¹²¹ The police report noted one of the responding officers approached the vehicle, tapped on the glass and "as [the Deputy Assistant Administrator] opened the door, she put her hands in the air and without provocation announced 'I'm not driving.'"¹²² The officer reported "[w]hen [the Deputy Assistant Administrator] spoke, I immediately observed the odor of an alcoholic beverage emanating from her breath."¹²³ An officer asked her where the driver of the vehicle was and she identified another individual as the driver.¹²⁴ She claimed the driver left her alone in the car and went to an address, which she provided to the police.¹²⁵ The NPR noted:

[Her] attempt to blame someone else for the danger [she] put others in and for the property damage [she] caused was made more egregious by the fact that (redacted), the person [she] named as the driver of [her] vehicle is (redacted), a member of the aviation community. (Redacted) is a TSA

¹¹⁵ Memorandum from Donna M. Rachuba, Unit Chief, Office of Prof'l Responsibility, Transp. Sec. Admin. to Dep. Ass't Adm'r, Office of Sec. Policy and Indus. Engagement OPR 15-7266, *Notice of Proposed Removal* (Aug. 5, 2015) [hereinafter *Dep. Ass't Adm'r Notice of Proposed Removal*].

¹¹⁶ Settlement Agreement Between Dep. Ass't Adm'r and Transp. Sec. Admin. (Jun. 18, 2015) [hereinafter *Dep. Ass't Adm'r Settlement Agreement*].

¹¹⁷ U.S. DEP'T OF HOMELAND SEC., TRANSP. SEC. ADMIN., CASE NO. I150062, REPORT OF INVESTIGATION 3 (May 18, 2015) [hereinafter *DEP. ASS'T ADM'R REPORT OF INVESTIGATION*].

¹¹⁸ *Dep. Ass't Adm'r Notice of Proposed Removal* at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *DEP. ASS'T ADM'R REPORT OF INVESTIGATION* at 3.

¹²² *Id.* at 23.

¹²³ *Id.*

¹²⁴ *Id.* at 17.

¹²⁵ *Id.*

stakeholder and a member of TSA's Aviation Security Advisory Committee (ASAC), which provides advice and recommendations to improve civil aviation security measures to the TSA Administrator.¹²⁶

The Deputy Assistant Administrator's assertions she was not driving the vehicle were contradicted by the witness who reported the crime.¹²⁷ The NPR explains:

The witness identified [the Deputy Assistant Administrator] as the driver of the white speeding car and also told police that she had observed [the Deputy Assistant Administrator] exit the driver's side of the car and then re-enter the car on the passenger side. . . . [T]he police officers discovered two parked cars nearby that had been struck and had damage consistent with the damage to [the Deputy Assistant Administrator's] vehicle."¹²⁸

The ROI explained:

[A]fter several attempts during the breath alcohol testing, [she] failed to provide a sufficient breath sample as directed.¹²⁹ [Her] statements to [the police officers] appear to have been intended to mislead the police into believing that [she was] not driving [her] car under the influence of alcohol prior to its coming to rest facing the wrong way on a one-way street, damaged and inoperable.¹³⁰

The Deputy Assistant Administrator reported her arrest to TSA within 24 hours as required.¹³¹ On April 24, 2015, she pleaded guilty to the DWI charge and was sentenced to 180 days in jail, 178 of which were suspended.¹³² She was interviewed by TSA's OOI on May 4, 2015.¹³³ The Deputy Assistant Administrator "took full responsibility for her actions, according to the ROI. She did not contest the information in the police report."¹³⁴ She told OOI she had approximately four to five drinks and did not remember driving her car afterwards, her statements to the police officers, or hitting any parked cars.¹³⁵

OPR determined the Deputy Assistant Administrator should be removed from federal service, noting "[a]s a Deputy Assistant Administrator and a member of the agency's senior leadership team, the agency reasonably holds [her] to a higher standard of conduct than lower level employees."¹³⁶ It stated her "actions leading up to [her] arrest showed poor judgment. However, [her] subsequent attempts to conceal [her] actions by providing misleading

¹²⁶ *Dep. Ass't Adm'r Notice of Proposed Removal* at 4.

¹²⁷ *Id.* at 2.

¹²⁸ *Id.*

¹²⁹ DEP. ASS'T ADM'R REPORT OF INVESTIGATION at 3.

¹³⁰ *Dep. Ass't Adm'r Notice of Proposed Removal* at 4.

¹³¹ *Id.* at 2.

¹³² *Id.*

¹³³ DEP. ASS'T ADM'R REPORT OF INVESTIGATION at 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Dep. Ass't Adm'r Notice of Proposed Removal* at 3.

information to the police regarding who was driving [her] vehicle has irretrievably undermined TSA's ability to trust [her]."¹³⁷

OPR noted the Deputy Assistant Administrator's attempt to blame the ASAC member for driving the car "cannot be tolerated."¹³⁸ The Notice of Proposed Removal stated:

The negative nature of [her] conduct was further exacerbated by the fact that 'her] consumption of alcohol to the point that [she] now maintain[s] that [she] cannot recall most of the events of the evening, including operating [her] car, was witnessed not only by a TSA stakeholder, but also by [redacted], [her] subordinate employee in OSPIE.¹³⁹

Despite the severity of her conduct and OPR's proposal to remove her from the agency, TSA granted the Deputy Assistant Administrator a settlement allowing her to remain in her position at TSA with a 14-day unpaid suspension and no demotion or change in salary.¹⁴⁰ Under the terms of the settlement. She agreed to withdraw any pending legal claims against TSA, waive her right to pursue administrative or judicial action, and release the government of any claims or liabilities.¹⁴¹

Colon testified the Deputy Assistant Administrator's supervisor mishandled the situation by failing to place the Deputy Assistant Administrator on administrative leave after she received the NPR.¹⁴² Colon ultimately attributed the decision to grant her the settlement to former TSA Administrator Peter Neffenger. He stated:

- A. So I believe that Ms. Kerner was involved in – she had knowledge of it. I had heard about it. I didn't have any involvement in it until after the proposal was issued, that there apparently was a movement by her supervisor that – the assistant administrator of the Office of Security Policy and Industry Engagement. We call it OSPIE, O-S-P-I-E, which is where [she] was the deputy assistant administrator, TSES. She – Mr. Mayenschein, when she received a proposal notice, you know, did not put her on administrative leave and did not change her duties. That ends up becoming a problem if I have to take that case to litigation because in a circumstance in which you're proposing someone's removal at that high level, they should not be continuing to do their job on a day-to-day basis, you know? At a minimum, he should have reassigned her to, you know, a job. She was, in fact, reassigned to counsel while the investigation was going on. She did not work for me. But, you know, so, ultimately it was my understanding – and so then I had mentioned to you earlier Michael Gaches, who is the person who covers for me

¹³⁷ *Id.* at 4.

¹³⁸ *Id.* at 5.

¹³⁹ *Id.*

¹⁴⁰ Dep. Ass't Adm'r Settlement Agreement.

¹⁴¹ *Id.*

¹⁴² Colon Tr. 106–07.

when I am out, I had gone – I went on vacation and he ended up trying to negotiate a settlement of this case. And, if memory serves, it was because Mr. Neffenger had met with Ms. Kerner, and I believe – and I don't know if he met with Ms. Kerner or he met with Mr. Mayenschein and told Ms. Kerner that he wanted to settle with her, but, ultimately, you know, we put forth, without her reply, a 14-day suspension, no loss of security clearance – I'm sorry, no loss of position or no loss of the TSES.

Q. You said you were out. Were you involved in the actual drafting or presenting of the settlement agreement in the case?

A. I am almost positive I reviewed – Mr. Gaches sent, I think, the negotiations back and forth in talking with [her] counsel. I didn't – I'm sure I reviewed the settlement agreement before it went for signature because I always do. You know? So I did see it, yes.¹⁴³

Colon acknowledged the outcome of the case “was not the proper outcome” and the disposition of the Deputy Assistant Administrator's and the Assistant Administrator's cases contributed to perceptions of favoritism toward senior managers. Colon testified:

Q. What do you think the perception was in the agency about how [the Deputy Assistant Administrator] situation was handled?

A. For anyone who knows about it, it's – there was – for anyone who would know the circumstances of the misconduct and the ultimate outcome, that – you know, that that was not the proper outcome.

Q. Do you think there is a perception at the agency that TSA senior management engages in favoritism at times?

A. I believe that it's – I believe when you don't have – I believe that – I know the perception. I believe that – I – you know, that it's not necessarily favoritism per se. Because all of the – all proposal and decision processes, either at management level or at the OPR level, the deciding official has the right to mitigate the penalty. You know? Will that create a perception of favoritism? Absolutely.

You know, I don't know why General Taylor did what he did regarding [the Assistant Administrator]. You know, I don't know why Mr. Neffenger did what he did, you know, to save [the Deputy Assistant Administrator]. But, you know, obviously you're going to get a perception like that when you have your senior managers who have done, you know, bad things and you don't, you know, come down on them whereas you – you know, you hear it all the

¹⁴³ *Id.*

time, would you have done that for a line TSO? And, you know, as a comparison. Would a line TSO who had lied to the police, you know, said that an agency, you know – somebody who is a stakeholder of the agency, you know, was driving their car, and – would they get off? And, so, I can see why.¹⁴⁴

As Colon stated, TSA’s decision to allow the Deputy Assistant Administrator to remain in her position with only a 14-day suspension reinforced the perception senior leaders at TSA received more favorable treatment for misconduct than rank-and-file employees.

2. Assistant Federal Security Director for Inspections Made Offensive Comments, Engaged in Inappropriate Conduct, and Lied

On November 14, 2017, OPR issued a Notice of Decision (NOD) to remove the Assistant Federal Security Director for Inspections (AFSD) at a Midwest airport, from federal service. He was found to have made sexually inappropriate and racially offensive comments, engaged in inappropriate conduct, and to have lacked candor by falsely denying inappropriate comments.¹⁴⁵ The decision to remove him came after years of misconduct, including incidents in which the airport’s FSD was present.

On December 28, 2016, the FSD reported a complaint against the AFSD for Inspections to OOI alleging on November 30, 2016, the AFSD made inappropriate statements to a female employee, who was a subordinate in his division, comparing her breast size to his daughter’s. On December 28, 2016, the FSD also issued the AFSD a No Contact Order, prohibiting him from having any contact with the female employee.¹⁴⁶ OOI’s investigation found the AFSD made numerous inappropriate and offensive comments about women as well as derogatory comments about Muslims.¹⁴⁷

The female employee said the AFSD made approximately 10 to 12 statements she considered to be sexual harassment dating back to 2010 and detailed multiple inappropriate statements including the specific dates they occurred.¹⁴⁸ She stated several of these incidents took place in the presence of other TSA employees, including a March 30, 2011, incident in which the AFSD, the FSD, and other employees discussed how many women they slept with while at port in the Navy.¹⁴⁹ The female employee provided OOI with contemporaneous notes detailing incidents of harassment.¹⁵⁰

¹⁴⁴ *Id.* at 107–08.

¹⁴⁵ Memorandum from Donna M. Rachuba, Unit Chief, Office of Prof’l Responsibility, Transp. Sec. Admin. to Ass’t Fed. Sec. Dir. for Inspections, Transp. Sec. Admin. OPR 17-10087, *Notice of Decision* (Nov. 14, 2017). [hereinafter *AFSD Notice of Decision*].

¹⁴⁶ U.S. DEP’T OF HOMELAND SEC., TRANSP. SEC. ADMIN., CASE NO. I17-0046, REPORT OF INVESTIGATION 3 (May 19, 2017) [hereinafter *AFSD REPORT OF INVESTIGATION*].

¹⁴⁷ *AFSD Notice of Decision* at 2–3.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *AFSD REPORT OF INVESTIGATION* at 16–17.

The AFSD submitted to a polygraph examination.¹⁵¹ The polygraph showed deception by the AFSD in his responses to questions about whether he compared the employee's breast size to his daughter's.¹⁵² After being notified of the results, he admitted to making inappropriate comments toward women, recanted his original sworn statement, and provided a new one.¹⁵³ Despite these admissions, the AFSD claimed he did not lack candor in his responses during the polygraph, tried to explain his inappropriate remarks, and claimed the female employee only became offended by his comments after she did not receive a promotion.¹⁵⁴

Other accounts allege the AFSD made offensive comments stating women were less intelligent than men and were too emotional to hold leadership roles, such as "the reason the United States was in disrepair because women had been given the right to vote and women are not emotionally capable of being rational when it comes to politics"¹⁵⁵ and telling a female employee "[he] hoped she had brought a global positioning system (GPS) because women in general were not smart enough to read a map or get from one place to another without directions."¹⁵⁶

One female employee explained, while she was pregnant, the AFSD made "mooring" sounds at her in the office on approximately four different occasions and he also said "[he] did not believe women should get maternity leave because, when women used to travel by wagon train, they would squat, have the baby, pick him or her up, and keep moving."¹⁵⁷

In addition to his offensive comments toward women, TSA employees stated he made derogatory comments about Muslims. Multiple employees acknowledged the AFSD referred to Muslims as "stupid ragheads" or "rag heads."¹⁵⁸ The AFSD admitted to making inappropriate comments about Muslims, including calling them "stupid ragheads."¹⁵⁹

In the Notice of Decision, the deciding official stated:

[the AFSD's] actions, taken as a whole, demonstrate a serious lack of judgment, which brings into question [his] reliability in performing [his] duties as a senior management official. I find that [his] actions have irrevocably damaged TSA's ability to rely on [his] integrity, trustworthiness and to maintain confidence that [he] will appropriately perform [his] job responsibilities.¹⁶⁰

The AFSD was allowed to engage in inappropriate behavior for at least seven years. Numerous employees stated either he harassed them or they witnessed his improper behavior

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 3–4.

¹⁵⁴ *Id.* at 4–5.

¹⁵⁵ *AFSD Notice of Decision* at 2–3.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 7.

over a span of time. TSA failed to respond in a timely manner, resulting in employees being subjected to years of harassment.

3. TSA Security Officials Engage in Several Acts of Sexual Misconduct

The Assistant Administrator's and the AFSD's sexual misconduct were not isolated occurrences. There is evidence of multiple instances of sexual misconduct by airport security officials including AFSDs and Deputy Assistant Federal Security Directors (DAFSDs).

In September 2015, TSA issued a DAFSD a 14-day suspension for engaging in sexual relations in the workplace with a coworker between 2003 and 2009.¹⁶¹ The official accepted full responsibility for the misconduct, but had previously received a ten day suspension in 2005 for having an inappropriate relationship with a subordinate employee.¹⁶² A 14-day suspension is the maximum of the recommended penalty range for misconduct of a sexual nature, though the aggravated penalty range includes removal.¹⁶³

In a different September 2015 decision, TSA issued another DAFSD a 7-day suspension for sending a female subordinate inappropriate text messages between their personal cell phones.¹⁶⁴ The DAFSD also left the female employee a voicemail referencing a recent article about a woman using an online dating application who had posted a picture online of herself in bed with a NFL player claiming she had slept with the athlete.¹⁶⁵ The DAFSD asked in the message, "hey, that wasn't you with [NFL player], was it?"¹⁶⁶ The female employee told OOI in a sworn statement she felt "disrespected," "extremely uncomfortable," "sexual[ly] harassed," and "degra[d]ed as a female."¹⁶⁷

Although OPR initially proposed a 14-day suspension, the deciding official reduced the DAFSD's punishment to a 7-day suspension, a penalty in the middle of the recommended range for inappropriate/and or unwelcome verbal conduct of a sexual nature as opposed to the maximum.¹⁶⁸ The deciding official cited the DAFSD acknowledged his conduct was unprofessional and inappropriate and indicated he "immediately stopped" his actions once "made aware of the objections" and his "approach to the workforce has changed dramatically" since the incident.¹⁶⁹

A December 2017 Notice of Proposed Removal (NPR) for another DAFSD presents a parallel example to the Assistant Administrator's case, but TSA's disposition of the DAFSD's case offers a contrast. According to the NPR, "[i]n or about 2012, [the DAFSD] had an intimate

¹⁶¹ *AFSD Notice of Decision*.

¹⁶² Memorandum from Donna M. Rachuba, Unit Chief, Office of Prof'l Responsibility, Transp. Sec. Admin. to Deputy Assistant Fed. Sec. Dir. of Screening, Transp. Sec. Admin. OPR 15-9139, *Notice of Decision* (Sept. 11, 2015) [hereinafter *DAFSD1 Notice of Decision*].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 9.

relationship with Transportation Security Officer (TSO), [redacted name], a subordinate employee. [The DAFSD] failed to report the relationship to [his] manager.”¹⁷⁰ The DAFSD was also charged with Lack of Candor for falsely stating in an August 12, 2016 sworn statement, he had “not socialized with TSO [redacted] off duty” and had “never had a sexual relationship with TSO [redacted].”¹⁷¹

After his initial denial, the DAFSD was confronted with the contradicting account in a second interview the same day. He then admitted he had a sexual relationship with the TSO and had sexual intercourse with her twice in 2012.¹⁷²

The deciding official concluded the misconduct was aggravated and the DAFSD should be removed from federal service.¹⁷³ The NPR noted:

[The DAFSD’s] lack of candor is a serious offense. An employer has the right to expect any employee, when questioned about specific matters, to provide truthful and complete responses. An employee’s failure to be candid in response to agency inquiries and investigations calls into question the employee’s integrity, and has the potential to undercut the employee’s credibility in other matters. Lack of candor is particularly problematic, especially as a management official. The facts in this case show [the DAFSD’s] willingness to give an inaccurate account of events if it serves [his] self-interest.¹⁷⁴

TSA’s senior management handled this case much differently than the Assistant Administrator’s case. The Assistant Administrator had a more senior title and management responsibility. He committed four counts of misconduct, including lack of candor. He only received a 14-day suspension with a demotion in title, not pay. By contrast, the DAFSD had a less senior title, fewer responsibilities, and engaged in only two acts of misconduct, but was removed from service.¹⁷⁵

These incidents illustrate a pattern of sexual misconduct among senior TSA officials. TSA must do more to prevent sexual misconduct and ensure officials who engage in such behavior are held accountable without double standards.

4. Double Standards for Misconduct

TSA’s lax treatment of misconduct by senior officials stands in contrast to the agency’s expectations of rank-and-file TSOs. For example, Kansas FSD Jason Brainard testified TSOs have been fired for picking up expensive pens dropped at a security checkpoint by inspectors conducting integrity tests. Brainard stated:

¹⁷⁰ Memorandum from Denise D. Stark, Unit Chief, Office of Prof'l Responsibility, Transp. Sec. Admin. to [redacted employee], Transp. Sec. Admin. OPR 16-1937, *Notice of Decision* (Dec. 6, 2017).

¹⁷¹ *Id.* at 2.

¹⁷² *Id.* at 2–3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 5.

¹⁷⁵ See generally ASS’T ADM’R REPORT OF INVESTIGATION.

Q. Can you comment on the pen?

A. So the case in Des Moines which happened, as I understand it, a number of places because they were joking, it's the most effective test they had. They come in with a pen. It's a very expensive pen – I – you know, if you are into pens. They dropped it –

Q. Is there a – is there a certain – is it manufactured by a certain –

A. It's a Mont Blanc pen.

Q. And how much do those cost?

A. Couple hundred bucks. So they dropped it on the floor. TSO picked it up, hand it to Lee, Lee puts it into his pocket and goes home. And they talked him into resigning. They came back out and talked him into resigning.

There was an officer in Wisconsin, I believe, that he actually threw it in the dumpster because people just don't put a value on pens. And I've got to tell you, I'm the biggest thief of pens in my operation. I'll go to somebody's office, I'll pick up a pen and use it and I'll walk out. I don't do it for the intent to deprive somebody, but unfortunately, if I pick up a pen – I guarantee you, if you leave me a pen I'm taking it.

Q. Is there a reviewal of video that's captured?

A. We actually had captured video provided to them and then they confront the employee with it.

Q. Provided to OOI.

A. Provided to OOI, yes, sir.¹⁷⁶

Brainard further stated firing TSOs for picking up pens was indefensible given the issues with misconduct at the agency. He testified:

Q. Do they issue the individual a letter of reprimand or just removal recommendations?

A. No, they come out and in typical fashion they come out and they use their criminal investigative training to – to interview the employee.

¹⁷⁶ Jason Brainard Transcribed Interview 219–20, Apr. 8, 2016 (on file with the Committee) [hereinafter Brainard Tr.].

In this case the employee resigned. Oftentimes, that's what they're looking for, to get a result.

They come out and do the tests. They leave. We get the tape. They fly out, two of them again, and do this and then they leave. In the Office of Inspections, and I want to point this out 'cause I think it's important. The Office of Inspections has been on the hot seat because of the amount of time they spend on non criminal matters.

And part of the reason they come out and they take a case that is non criminal and refer it to the U.S. attorney, to the local state's attorney and get a declination of prosecution so they can check that law enforcement box. It's just a shell game to those guys. And they do it in almost every case and that's why they do that, because they know the scrutiny they're under in the amount of time they spend on criminal matters and it's very, very minor.

Q. To your knowledge, do you know how many individuals were fired or forced to resign due to the stealing of a pen?

A. I don't have – I don't have a number, but I know enough that they were joking about the fact that it was the most successful test item they had.

Q. Integrity test item?

A. Integrity test item. And it's very frustrating to hear about firing people for pens. I'm not saying that people shouldn't be held accountable, but when we've got the problems that we do in our agency and they're coming after our people for pens, that really – it – it – I find it's infuriating.¹⁷⁷

5. Regional Director in the Office of Global Strategies

TSA's Office of Inspection forwarded a Report of Investigation to OPR to review and adjudicate an investigation into a Regional Director in the Office of Global Strategies.¹⁷⁸ The Notice of Decision from OPR includes the way the Director made comments describing fellow TSA managers and employees in profane and derogatory terms.¹⁷⁹ The Director also allowed an Executive Assistant to complete some of the Director's TSA Online Training Center training.¹⁸⁰

¹⁷⁷ *Id.*

¹⁷⁸ Memorandum from Robert Miller, Unit Chief, Office of Prof'l Responsibility, Transp. Sec. Admin. to (Name Redacted), Regional Dir., Office of Global Strategies, Transp. Sec. Admin. OPR 13-0797, *Notice of Decision* (May 7, 2013).

¹⁷⁹ *Id.* at 2–6.

¹⁸⁰ *Id.* at 6.

The recommended penalty range pertaining to using inappropriate language is a five to fourteen-day suspension, and the mitigated range, which allows deciding officials to take personal factors into account, is a Letter of Reprimand up to a four-day suspension.¹⁸¹ The penalty range for failure to follow policy, pertaining to the Online Training Center, is a Letter of Reprimand up to a fourteen-day suspension, with a mitigated range being a Letter of Counseling.¹⁸² The Regional Director's Notice of Decision letter mitigated a proposed fourteen-day suspension to a five-day suspension:

In your reply and in your statement to OOI, you also raised other mitigating issues. In particular, you contended that use of unprofessional language in the workplace was common place. You wrote in your reply that your "work environment regularly included such inappropriate speech by many others including peers and supervisors." You also asserted that you "did not ever receive any guidance not to [use unprofessional language] from any of [your] supervisors or even colleagues as [your] career progressed with TSA." I have considered each of these assertions in determining the appropriate corrective action to impose, but have not given them significant weight. In particular, I do not have specific allegations regarding other employees before me for decision. Moreover, I do not find your assertion that you were never given guidance about appropriate language in the workplace to provide any basis for mitigation. The agency should not have to provide guidance to any employees, especially one in a senior management position, that using unprofessional language and gestures directed at other employees is improper.

Finally, I referred to the TSA *Table of Offenses and Penalties* (Table), dated September 26, 2011, to determine the appropriate penalty to impose. Although I note that the Table was not in effect at the time of some of your misconduct, I used it solely as a guide. Section B.5 of the Table, pertaining to using inappropriate language, provides for a recommended penalty range of a five (5) day suspension to a fourteen (14) day suspension, and a mitigated penalty range of a Letter of Reprimand (LOR) to a four (4) day suspension. Section D.4 of the Table, pertaining to failure to follow policy, provides for a recommended penalty range of an LOR to a fourteen (14) day suspension, and a mitigated penalty range of a Letter of Counseling. After giving significant weight to your years of discipline-free service, your performance ratings and awards, and the age of the incidents at issue, I find that a penalty within the mitigated penalty range of the applicable section of the Table is appropriate. I nevertheless find that a suspension is appropriate given

The Second Step Grievance Decision further mitigated a five-day suspension to a Letter of Reprimand.¹⁸³ The Grievance Decision plainly lays out the Regional Director did not dispute the facts but still did not uphold the required penalties:¹⁸⁴

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Memorandum from Heather Sigrist Book, Dep. Ass't Adm'r, Office of Prof'l Responsibility, Transp. Sec. Admin. to (Name Redacted), Regional Dir., Office of Global Strategies, Transp. Sec. Admin. OPR 13-0797, *Second Step Grievance Decision – Letter of Reprimand* (Sept. 6, 2013).

¹⁸⁴ *Id.* at 1.

In your grievance, you do not dispute the underlying facts upon which the Deciding Official based his decision. Those facts established that during your employment with TSA, you frequently made unprofessional comments. The comments you made included using profanity in the workplace and describing fellow TSA managers and employees in profane and derogatory terms. Examples cited in the Office of Inspection Report of Investigation included the following

Notably, TSA chose a Letter of Reprimand—the lightest penalty. The Agency insufficiently claimed its mitigation was an effort to “promote the efficiency of the Federal Service.”¹⁸⁵

In your role as a senior manager, the agency reasonably expects that you will serve as a role model. Your conduct, therefore, should be beyond reproach, and should include, among other things, complying fully with agency policies and treating your fellow employees with dignity and respect. Your actions fell short of meeting that expectation. Nevertheless, I find that your ten (10) years of service with TSA, your lack of any prior discipline, and your many performance-based awards are mitigating factors that warrant a reduction in the penalty imposed. I noted that Section B.5 of the TSA *Table of Penalty and Offenses* (Table), dated September 26, 2011, provides for a mitigated penalty range of an LOR to a four (4) day suspension for using inappropriate language, and Section D.4 of the Table provides for a mitigated penalty of a Letter of Counseling for failure to follow policy. After giving considerable weight to the mitigating factors, I find that an LOR is adequate to address your misconduct, and the least action necessary to promote the efficiency of the Federal service.

6. Deputy Federal Security Director

The Office of Professional Responsibility found the Deputy Federal Security Director (DFSD) was delinquent in making payments on his government credit card, ranging from \$674 to over \$3,600, on thirteen occasions over a three-and-a-half-year period.¹⁸⁶ The DFSD blamed the late payments on “weekend and/or after hours posting” of the payment made by phone, but later admitted his comments were “speculation.”¹⁸⁷ The following table represents the level of failure by the DFSD to pay his debts:

Charge 1: Failure to Timely Honor Debts:

- Specification 1: In September 2010, you were delinquent in your payment of \$1,106.02 on your government travel card.
- Specification 2: In October 2010, you were delinquent in your payment of \$846.84 on your government travel card.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ Memorandum from Denise Stark, Unit Chief, Office of Professional Responsibility, Transp. Sec. Admin. to (Name Redacted), Dep. Fed. Sec. Dir., Operations, Transp. Sec. Admin. OPR 14-12814, *Notice of Decision* (May 29, 2015).

¹⁸⁷ *Id.* at 3.

- Specification 3: In November 2010, you were delinquent in your payment of \$844.75 on your government travel card.
- Specification 4: In December 2010, you were delinquent in your payment of 2,097.05 on your government travel card.
- Specification 5: In March 2011, you were delinquent in your payment of \$1,042.01 on your government travel card.
- Specification 6: In July 2011, you were delinquent in your payment of \$945.57 on your government travel card.
- Specification 7: In October 2011, you were delinquent in your payment of \$684.80 on your government travel card.
- Specification 8: In May 2012 you were delinquent in your payment of \$3,516.22 on your government travel card.
- Specification 9: In October 2012, you were delinquent in your payment of \$2,536.34 on your government travel card.
- Specification 10: In November 2012, you were delinquent in your payment of \$3,616.68 on your government travel card.
- Specification 11: In January 2013, you were delinquent in your payment of \$2,259.22 on your government travel card.
- Specification 12: In May 2013, you were delinquent in your payment of \$674.28 on your government travel card.
- Specification 13: In January 2014, you were delinquent in your payment of \$3,376.22 on your government travel card.

The DFSD gave his Executive Assistant the FedTraveler login information to submit and certify travel vouchers.¹⁸⁸ A Financial Specialist told the DFSD it would be a violation of policy for her to certify and submit the vouchers on the DFSD's behalf.¹⁸⁹ Another Financial Specialist told the DFSD the Executive Assistant could prepare the DFSD's travel voucher, but the DFSD would need to sign in and submit it.¹⁹⁰ The DFSD admitted he relied on his Executive Assistant to submit the travel claims upon return from a trip and authorized the Executive Assistant to

¹⁸⁸ *Id.* at 3–8.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

submit vouchers.¹⁹¹ The DFSD failed to submit six travel vouchers within five business days of returning from official travel per TSA policy.¹⁹²

The DFSD drove a government vehicle six times without properly documenting the usage.¹⁹³ A Program Analyst wrote in a statement the DFSD asked the employees who brought him the government vehicle and returned it to the parking garage to complete the TSA Form 209 for him.¹⁹⁴ The Program Analyst told investigators: “[E]mployees state they are uncomfortable about signing a logbook for the mileage put on the car they did not drive.”¹⁹⁵

The deciding official found having someone other than the individual certifies his travel vouchers after being told it would violate policy was an aggravating factor. The recommended penalty range for failing to pay a government credit card in a timely manner is a Letter of Reprimand to a fourteen-day suspension. The penalty range for failure to follow policy is a Letter of Reprimand to a fourteen day suspension. The decision letter mitigated a proposed fourteen-day suspension to a three-day suspension.

III. TSA Used Directed Reassignments to Retaliate Against Its Employees

On April 27, 2016, three TSA whistleblowers testified before the Committee in an open hearing about serious misconduct and management issues at the agency. These whistleblowers described an atmosphere of intimidation and retaliation at TSA. One of TSA’s principal methods of retaliation at the agency was through involuntary directed reassignments.

The Committee’s investigation found considerable evidence these directed reassignments were used improperly. TSA employees were issued lateral directed reassignments to new positions hundreds of miles from their stations without any discernable organizational need or justification. In many cases, accepting the reassignments would cause the employees significant hardship for reasons such as financial issues and family obligations. As a result of the Committee’s investigation, TSA made significant changes to its policy on directed reassignments and has reached settlements to date totaling at least \$1 million with TSA personnel who were affected by this issue.

Andrew Rhoades, the Assistant Federal Security Director (AFSD) for Mission Support at Minneapolis-St. Paul International Airport, and the recipient of a directed reassignment, testified, “[d]irected reassignments have been punitively used by TSA senior leadership as a means to silence dissent, force early retirement or resignations.”¹⁹⁶ Rhoades testified:

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 9.

¹⁹⁶ *TSA Hearing Part I – Rhoades Statement*

Senior leader misconduct and retaliation, if left unaddressed, will place the American public at risk as managers are more worried of retaliation from their own supervisors than they are focused on defeating the threat. Directed reassignments, retaliation and misconduct are inextricably intertwined and help explain why the TSA underperforms.¹⁹⁷

A. TSA Policies on Directed Reassignments

A directed reassignment is an involuntary reassignment from one position in TSA to another. TSA Chief Counsel Francine Kerner described directed reassignments as “when you tell someone they have to go work someplace else.”¹⁹⁸ TSA’s policy on directed reassignments is found in TSA Management Directive 1100.30-4 on Permanent Internal Reassignments. Under this policy, the issuance of a directed reassignment is explicitly predicated on the action being within TSA’s needs and interests. Karen Shelton Waters, Assistant Administrator for the Office of Human Capital, stated directed reassignments require a business justification.¹⁹⁹

TSA’s old policy stated managers could “reassign employees involuntarily without loss in pay band or basic pay from one position to another for which they qualify, within or outside the local commuting area, when such action is in the best interest of TSA.”²⁰⁰ The policy further stated the “personal interests and desires of the employee shall be carefully considered, but the final decision shall be made according to the needs of TSA.”²⁰¹ Declining to accept a directed reassignment could cause employees to lose their job. TSA’s policy stated “[m]anagement officials shall initiate a separation action if an employee refuses to accept a directed reassignment.”²⁰²

¹⁹⁷ *Id.*

¹⁹⁸ Kerner Tr. at 30.

¹⁹⁹ TSA Briefing to Committee Staff.

²⁰⁰ T.S.A., Office of Human Capital, TSA MD 1100.30-4, Handbook, Permanent Internal Assignments (Oct. 4, 2007), effective Mar. 28, 2004, revised Jun. 27, 2012.

²⁰¹ *Id.*

²⁰² *Id.*

K. Directed (Involuntary) Reassignment:

1. Managers may reassign employees involuntarily without loss in pay band or basic pay from one position to another for which they qualify, within or outside the local commuting area, when such action is in the best interest of TSA. When a directed reassignment is contemplated, the employee shall be fully informed by the appropriate management official in writing of the reasons for the action. The personal interests and desires of the employee shall be carefully considered, but the final decision shall be made according to the needs of TSA.
2. When a directed reassignment requires an employee to relocate outside the commuting area, the employee shall, under normal circumstances, be given at least sixty (60) days advance notice of the reassignment date. In unusual circumstances the notice period may be reduced to thirty (30) days. Because a directed reassignment is, by nature, in the interest of the Government, TSA may be obligated under travel policies to pay certain relocation expenses when effecting a directed reassignment involving a relocation outside the commuting area.
3. Management officials shall initiate a separation action if an employee refuses to accept a directed reassignment. An employee who declines to accept an offered position might be eligible for a discontinued service retirement or severance pay if certain conditions are met (see [TSA MD 1100.55-4, Severance Pay](#)). *Officials exercising the authority to effect a directed reassignment should consult with the Office of Human Capital in advance of taking any action.*

B. TSA's Use of Directed Reassignment Devolved Over Time

While directed reassignments have been a longstanding feature of TSA's personnel rules, their use changed considerably over time. Rhoades testified "[t]he practice of directed reassignments began under the tenure of our fourth permanent TSA Administrator [Kip Hawley] primarily at the direction of his deputy administrator [Gale Rossides]," but "[t]he practice continued and intensified with the next administrator [John Pistole] whose law enforcement background shaped his thinking on the subject."²⁰³

1. TSA Leaders Changed Agency Policy to Dramatically Expand the Use of Directed Reassignments

Directed reassignments intensified in 2013 under Administrator Pistole and Deputy Administrator John Halinski. TSA initiated plans for the large scale directed reassignment of FSDs throughout the country as part of a "leadership succession planning" initiative included reassigning FSDs to new positions en masse and assigning them fixed "tour of duty lengths."²⁰⁴ TSA has a geographically diverse workforce, with airport security personnel in almost every major city in the United States. TSA employees can be reassigned almost anywhere.

²⁰³ *TSA Hearing Part I – Rhoades Statement.*

²⁰⁴ Memorandum from John Halinski, Dep. Adm'r, Transp. Sec. Admin. to staff, Transp. Sec. Admin, *Ongoing Leadership Succession Planning* (Apr. 2013) [hereinafter *Halinski Memo – Apr. 2013*].

Prior to 2013, directed reassignments were not widely known. One FSD testified: “[t]he phrase ‘directed reassignments’ became prominent in TSA – prominently used starting in 2013. I had never heard ‘directed reassignment’ ever.”²⁰⁵

Further, prior to 2013, FSDs were mostly hired through the USAJobs website rather than filled via reassignments. The FSD testified:

The FSDs were always selected, to my knowledge, through a posting on U.S.A. Jobs. And they would generate a pool of candidates and interested candidates would apply. They would generate the pool, interview the candidates. In rare circumstances I think people may have requested a transfer to go to different locations, but by [and large], it was done through U.S.A. Jobs.²⁰⁶

Administrator Pistole’s initiative promised to consider employee preferences and concerns about potential hardships for direct reassignments. But in practice, numerous TSA officials were issued directed reassignments, which had no discernible benefit for TSA and causing the employees significant hardship. This initiative was suspended by Acting TSA Administrator Mel Carraway in November 2014, but the program’s suspension failed to stop other senior TSA officials from issuing improper directed reassignments.²⁰⁷

Several senior TSA officials attributed this change to Pistole’s and Halinski’s backgrounds. A former senior FBI official and a retired Marine General, respectfully, they were accustomed to workforces in which officials in the field were frequently involuntarily moved. TSA Chief Counsel Francine Kerner explained the rationale for this policy. She testified:

Q. And how and when are [directed reassignments] used at TSA?

A. Well, they used to be used by John Halinski, who is the Deputy Administrator under John Pistole until July of 2014, July 12 of 2014. They used to be used to move people around. He believed – he had the military model of moving – he wanted to move FSDs around from point A to point B. And so those cases, a lot of people were given directed reassignments under those circumstances.

Q. So what was the purpose of the directed reassignment during that time period?

A. Well, I think what he said was that he was moving people around to give them experience in different parts of the country.²⁰⁸

²⁰⁵ Brainard Tr. at 70

²⁰⁶ *Id.* at 19.

²⁰⁷ *Id.* at 73–74

²⁰⁸ Kerner Tr. at 30.

TSA's former Assistant Chief Counsel for Administrative Litigation Steven Colon gave a similar explanation for the move to large-scale directed reassignments. He stated:

Q. Was there a policy decision during that timeframe to use directed reassignment?

A. Yes. It was my understanding there was a policy decision done in the Office of Security Operations under Mr. Pistole that there was going to be directed reassignments of Federal security director staff – I'm sorry, Federal Security Directors, essentially – that it was going to be – he wanted them to be more mobile. He came from FBI, where everyone knows at FBI you got to move, you know. And so – whereas, that wasn't the case at TSA, but he brought that in. And, you know, soon thereafter him and, I guess, Mr. Hogan had announced that that was what they – they were going to commence directly reassigning Federal Security Directors every 3 to 5 years.²⁰⁹

Kerner elaborated on TSA leadership's rationale for these large-scale directed reassignments and how this was a departure from TSA's established practices. She testified:

When you look at an organization like the FBI and you look at an organization like the ATF – I happened to have worked at ATF – you regularly expect to move as a SAIC. That's just the way it is. The same with the military model.

TSA was an organization that was built of people coming from all over the Federal and private sector, and some people came from organizations where moving on a regular and recurring basis was expected and considered desirable, and others came from organizations where you basically stayed in one spot your entire career.

So, when we have someone like an FSD, many of them, when they originally signed up to work at TSA, they were planning on spending their whole career at the airport, like George Naccara. He was from Boston. He wanted to stay in Boston. That was where he had his heart. And if you moved that man to a different location, he wasn't going to stay with TSA.

Now, if, on the other hand, you're a leader, like John Pistole or John Halinski, and you come from the FBI, where people move all the time, or you come from the military, where people move all the time, the Marines, where people move all the time, you feel that at some point we should be moving the Federal security directors around.

So it becomes a complicated picture of where people are coming from and

²⁰⁹ Joseph Salvator Transcribed Interview 43–44, Apr. 15, 2016 (on file with the Committee) [hereinafter Salvator Tr.].

what they think is desirable for the organization.²¹⁰

Kerner argued a variety of factors prompted the agency to issue FSDs directed reassignments. She stated:

A. And then you have headquarters and you have the FSDs. And the FSDs are working at airports where there is – if you look again at the history of TSA, the airports never had a Federal – they never had Federal people there in the way that we showed up with 1,000 people at this airport, 300 people at this airport. And so a lot of them went through the seven stages of denial, and, you know, they didn't want a Federal presence in their airport. But then they got to like it because they had their own Federal security director that they could use to carry messages to Washington about the need for resources, about issues at the airport.

So that meant that, again, I think, at times, there might be people in the front office who felt that the FSDs had grown too close to the airport that they were supposed to be overseeing and regulating and that they were more of a voice for the airports than they were a voice for TSA. And so that's been a difficult issue all along.

Also, some FSDs ran into trouble with the air carriers. For instance, we had FSDs at JFK who were moved out of their jobs. I think there were a couple – and if you ask me their names, I don't know who they are. But I do know, at the time, that the air carriers were not happy with the way the lines were moving, and so FSDs might have been moved out because of that.

So there are a lot of reasons that might lead to someone getting a directed reassignment. And so I personally was not involved in making those decisions, and we just dealt with the aftermath if people complained about their directed reassignments.

Q. So were the directed reassignments that you describe, under Mr. Halinski and that sort of model, was that only during that timeframe? Or was this –

A. Well, Gale Rossides, before him, had started doing some directed reassignments. But I don't think – so she had directed reassignments too. And then he continued the practice and made it – I think he formalized it.

And then it was when Mel Carraway came in as the Acting Administrator after Mr. Pistole left that the practice was formally

²¹⁰ Kerner Tr. at 38–39.

stopped. It was no longer a practice that was going to be followed as a matter of routine. And agreed that it was no longer going to be followed as a Neffenger matter of routine, and so he didn't follow it as a matter of routine.

But directed reassignments are an important part of the way you manage a Federal leadership, because you just have to have the ability to move people around when you're doing work at 450 locations. It's not going to be – it's not always going to be so easy. It's hard to keep people where they want to work in the way that they want to work.²¹¹

Joseph Salvator, Deputy Assistant Administrator of the Office of Security Operations at the time, similarly attributed the mass directed reassignments to a desire to adopt a model similar to the FBI. Salvator also noted a desire to rotate employees in leadership positions between headquarters and the field. He testified:

Q. You had mentioned previously that big movements happened in May, 50 to 60 directed reassignments in May 2013.

A. Just for OSO. There were others.

Q. What was the purpose, to your knowledge, of these big movements?

A. So I would reference the April 15th, 2013 memo from Mr. Halinski to the executive and L band workforce where he described the purpose. I believe the title of the memo was "Succession Planning."

Q. To your knowledge, how were these big movements in May succession planning?

A. So, to my knowledge, what I believe was going on was A, Mr. Pistole coming from the FBI, was adopting an FBI model, to some extent, and where they move the FBI special agents in charge around. Also, to my knowledge and my perception is, there were a lot of federal security directors who had been in place for many, many years at the same airport. And, to my knowledge, there was a big gap – one of TSA's problems – between people who were in leadership positions in the field not having headquarters experience and vice versa, people in the headquarters not having airport experience, created a large disconnect. So I think that was where they came up with that policy decision.

Q. Do you believe it was, to your knowledge, Mr. Pistole acting alone in deciding to adopt this FBI model, "FBI model," or were there

²¹¹ Kerner Tr. at 39–41.

others involved in discussions about this type of succession planning?

A. I don't know. I do know – I believe, to the best of my knowledge, that the movement started before I got to OSO, and I think even before Mr. Hoggan got to OSO, that they started doing the succession.

Q. To your knowledge, these big movements happened in May 2013 and May 2014. Was there a big movement in May 2015 as well?

A. I do not believe so. When – Mr. Carraway halted it at some point when he came in.²¹²

2. Assistant Administrator Kelly Hoggan Played a Key Role in Implementing the Expansion of Directed Reassignments

Kelly Hoggan, Assistant Administrator for the Office of Security Operations, played a key role in implementing the expanded use of directed reassignments. Hoggan's deputy Joseph Salvator assisted Hoggan in this task. Salvator stated he frequently served as what he called the "action officer" in the directed reassignment process. He testified:

Q. [D]id you play any role in any decision to reassign a federal security director?

A. As the deputy assistant administrator of OSO, I don't have the authority to move a federal security director. That being said, as the deputy assistant administrator, when the ERC [Executive Resource Council] approved relocations of federal security directors, I was often the – what I would call the action officer.

Q. What does the term "action officer" mean?

A. I would have to usually, in a lot of cases, have called the FSD and say, you're being reassigned.²¹³

Salvator was also present at the Executive Resource Council meetings, where senior TSA officials determined who would get reassigned. He stated:

Q. Were you ever present at the Executive Resource Council when directed reassignments were discussed?

A. Yes, on a few occasions.

²¹² Salvator Tr. at 194-96.

²¹³ *Id.* at 188.

Q. Do you know the dates?

A. I don't. The Executive Resource Council meets every other Thursday.

Q. And did you ever vote on one of the Executive Resource Council's decisions about a directed reassignment?

A. Yes, I believe I would have voted.

Q. Do you recall the individuals on whose assignments you voted?

A. I do not.²¹⁴

Salvator also testified Hoggan was responsible for developing the majority of directed reassignments. He stated:

Q. How would they be given instructions about which assignments to prepare? They would have been approved by the ERC?

Agency Counsel. "They" meaning whom? Do you mean the HR within OSO?

Q. HR within OSO.

A. On what to prepare?

Q. Yes.

A. Usually Mr. Hoggan.

Q. So this is before it's gone to the ERC.

A. Yes. Mr. Hoggan makes recommendations to the ERC on the movements.

Q. Did you play any role in developing recommendations?

A. On occasion, but I could say the majority of them were with Mr. Hoggan.²¹⁵

Salvator stated Hoggan "figured out, I would say, 98 percent of [directed

²¹⁴ *Id.* at 189.

²¹⁵ *Id.* at 191-92.

reassignments].”²¹⁶ Salvator further stated there were two large waves of directed reassignments in May 2013 and May 2014 as well as others that took place in between them. He testified:

Q. Do you recall the approximate number of directed reassignments on which you voted?

A. I do not. I don’t think – so just to put it in context, there was two – the big movements happened in May typically, so, like, the first May I was in OSO, we probably –

Q. To be clear, what year was that?

A. May of 2013. – there was probably 50, 60 reassignments, and then that second May, which was my tail end, there was probably 40 reassignments. So those were the major times. Then throughout the year there was other ones that happened. So I wasn’t a voting member at those two large ones.

Q. How many directed reassignments occurred throughout the year between the two large ones you referred to in the May periods?

A. I don’t know the exact number. It wouldn’t surprise me if it was 30 or so.²¹⁷

3. *TSA Leaders Promised Employees the Directed Reassignments Would Strengthen TSA’s Workforce and Consider Employee Needs and Preferences*

The leadership succession planning initiative, which served as the mechanism for the expanded use of directed reassignments, was presented to TSA’s TSES and Executive staff in a series of messages from TSA leadership. These messages stressed the initiative would strengthen TSA’s workforce and create opportunities for advancement while taking the needs and preferences of individual employees into consideration.

In a memorandum, Halinski wrote, “[o]ver the past two years, the Executive Resources Council (ERC) has thoughtfully assessed TSA’s leadership and organizational needs, and approved a number of selections/reassignments were endorsed by Administrator Pistole.”²¹⁸ He explained “TSES and Executive leadership positions will be filled via recruitment, or through voluntary or involuntary assignment.”²¹⁹

Halinski wrote the TSA Office of Human Capital’s (OHC) Executive Resources Division team would contact employees by e-mail with a list of vacancies, allowing staff to submit requests for positions of interest. He also indicated hardships would be taken into account during

²¹⁶ *Id.* at 197.

²¹⁷ *Id.* at 189–90.

²¹⁸ *Halinski Memo – Apr. 2013.*

²¹⁹ *Id.*

the process, writing staff would “have the opportunity to raise to your AA and the ERD any undue hardship you would encounter because of a relocation or reassignment.”²²⁰ Halinski urged employees to “assess TSA opportunities and your long-term career plans so the ERC can balance organizational and employee needs.”²²¹


²²⁰ *Id.*

²²¹ *Id.*



**Transportation
Security
Administration**

TO: Employees in TSES and Executive Positions, and DHS/TSA Candidate Development Program Graduates

FROM: John W. Halinski 
Deputy Administrator

SUBJECT: Ongoing Leadership Succession Planning

From Risk-Based Security initiatives to employee development and engagement, risk management is being integrated into all levels of TSA's decision-making and operational processes. TSA's ongoing succession planning initiatives are in alignment with risk management, as we recognize that each of you has unique perspectives, talents and expertise that can be leveraged in support of our mission. Based on this principle, we must continue to build a leadership corps that is accountable, resilient, and adaptable.

Over the past two years, the Executive Resources Council (ERC) has thoughtfully assessed TSA's leadership and organizational needs, and approved a number of selections/reassignments that were endorsed by Administrator Pistole. I fully support such succession planning initiatives, and this is to advise that the ERC will assemble in May to gauge current and future organizational, operational, and employee development conditions. TSES and Executive leadership positions will be filled via recruitment, or through voluntary or involuntary assignment. Executive positions are: L/M bands; non-TSES Federal Security Directors; OLE/FAMS Supervisory Air Marshals in Charge; OGS Transportation Security Administration Representatives (TSARs), OGS Deputy Director, International Operations; OGS Regional Managers, and non-TSES Deputy Assistant Administrators.

A few things will occur prior to the ERC's succession planning meeting in May. At my request,

- The Executive Resources Division (ERD) team in the Office of Human Capital will contact you via email to provide the of list current and upcoming vacancies. Employees who would like to be considered for a specific position, location, or geographical region will have the opportunity to submit their requests.
- You also will have the opportunity to raise to your AA and the ERD any undue hardship you would encounter because of a relocation or reassignment.
- ERD will contact you to ask that you submit a resume in a specific format. Instructions and a sample resume will be provided to you. ERD staff in the Executive Career Support Center will be available to provide guidance and answer questions.

If you haven't done so already, I urge you to assess TSA opportunities and your long-term career plans so the ERC can balance organizational and employee needs.

Thank you for your continued service, contributions and dedication in making TSA a high-performing, counterterrorism organization.

4. *TSA's Leadership Instituted Mass Directed Reassignments*

On June 3, 2013, Halinski sent another memo about the plan to use directed reassignments, entitled "Status of Succession Planning Initiatives." Halinski thanked TSA employees for responding to OHC's "request for resumes, position/geographic preferences, and hardship information," noting, "we had a 99% response rate and you provided valuable input that was thoroughly considered by the ERC members."²²² Halinski wrote, "our initiatives are focused on *planning* for TSA's future and ensuring that leadership has the professional development and support they need to succeed. This is the hallmark of a mature organization."²²³

Another round of "leadership succession planning"—directed reassignments—commenced the following year. On March 21, 2014, TSA's Executive Resources Division e-mailed TSA's TSES and Executive employees and SES candidate development program graduates informing them they were required to submit resumes in advance of a forthcoming Executive Resources Council (ERC) Leadership Succession Planning meeting.²²⁴

On April 8, 2014 OHC Assistant Administrator Karen Shelton Waters sent an e-mail listing current and projected TSES and Executive positions.²²⁵ Then in May 2014, the ERC met to make decisions on directed reassignments. Salvator attended the May 2014 ERC meeting where decisions were made on directed reassignments. He testified:

Q. So you were present in May of 2014 at the ERC when the – when directed reassignments were discussed?

A. Yes.

Q. Approximately how many were discussed at that time?

A. 60, 70, maybe.

Q. Was each directed reassignment voted on individually?

A. Yes.

Q. Did Mr. Hoggan present the recommendation for each directed reassignment to the ERC?

A. Yes.

Q. To your knowledge, did the ERC – let me rephrase that.

²²² Memorandum from John Halinski, Dep. Adm'r., Transp. Sec. Admin. to staff, Transp. Sec. Admin, *Status of Succession Planning Initiatives* (June 3, 2013) [hereinafter *Halinski Memo – June 2013*].

²²³ *Id.*

²²⁴ E-mail from Pamela Skowron, Transp. Sec. Admin., to staff, Transp. Sec. Admin (Mar. 21, 2014, 6:35 a.m.) (on file with the Committee).

²²⁵ E-mail from Karen Shelton Waters, Ass't Adm'r, Office of Human Capital, Transp. Sec. Admin., to staff, Transp. Sec. Admin. (Apr. 8, 2014, 10:19 a.m.) (on file with the Committee).

Would the ERC typically accept Mr. Hoggan's recommendation, or was there often debate about the recommendation?

A. There was often debate.

Q. To your knowledge, in a general sense, how many of the recommendations that Mr. Hoggan made were adopted by the ERC?

A. The majority.²²⁶

Salvator did not believe any of the decisions appeared to be retaliatory. He stated:

Q. Did any of the directed reassignments discussed at the May 2014 ERC meeting appear to be retaliatory to you?

A. Not in my opinion.²²⁷

5. TSA's Mass Directed Reassignments Failed

Senior TSA officials failed to abide by the promises TSA made when it instituted its leadership planning initiative. Directed reassignments were issued against employee's wishes. TSA's decision makers not only failed to consider employee needs or the potential hardships, they ignored employee requests for reconsideration on such a basis. Experienced employees with strong records of performance suffered significant hardships from accepting their reassignments, while others, who declined the reassignments, were forced to leave the agency. As discussed later in the report, there is evidence some reassignments were issued as a means of retaliating against disfavored employees, including whistleblowers.

On November 25, 2014, TSA Deputy Administrator Mel Carraway suspended the "Tour of Duty Lengths Initiative."²²⁸ This action was intended to halt the use of directed reassignments. Mark Hatfield, who became TSA's Acting Deputy Administrator in January 2015 after Carraway became TSA's Acting Administrator, confirmed directed reassignments were being used improperly at TSA and Carraway was troubled by the practice. Hatfield testified:

[Hoggan] was using the directed reassignment process to manipulate positions in the field and to both help people that were in favor and to punish people that were out of favor, in my assessment. And I felt that it was, you know – and, in fact, Mel Carraway suspended the use of directed reassignments. When he first got there, he was in agreement with this position as well.²²⁹

²²⁶ Salvator Tr. at 199–00.

²²⁷ *Id.* at 200–01.

²²⁸ Email from Email Melvin Carraway, Adm'r, Tran. Sec. Admin. (Nov. 25, 2014, 2:37 PM) (on file with the Committee).

²²⁹ Hatfield Tr. at 107.

Even after Carraway suspended the program, TSA officials continued to issue improper directed reassignments.

C. TSA Reassigned Jason Brainard from Iowa to Maine

Jason “Jay” Brainard was the subject of a directed reassignment in May 2014 as part of the leadership succession planning initiative. Brainard was one of TSA’s inaugural group of FSDs who joined the agency at its inception in 2002. He served as FSD at the Evansville, IL airport for over two years until taking a temporary detail to replace the departing FSD in Des Moines, IA in October 2004. Brainard applied for and was selected permanently take the job. In 2005 his area of responsibility was reorganized to include all airports in Iowa and he became the sole FSD responsible for operations in the state.²³⁰ He served as FSD in Des Moines until his reassignment in May 2014. Brainard stated when he applied for the Des Moines FSD position in 2004, “[t]here was no mention of mobility as a condition of employment within the announcement and there was no mobility agreement that I needed to sign.”²³¹

Between 2005 and 2010 Brainard applied for other opportunities in TSA requiring him to relocate or be available to do so, causing him and his wife to refrain from purchasing a home in Iowa during that period. In 2010, after serving as FSD in Des Moines for several years, Brainard and his wife purchased a home in Iowa. He earned high performance ratings in the position, including the highest rating Achieved Excellence in 2013 and 2014, and was recognized with awards including the Federal Security Director of the Year Award and the Gale D. Rossides People First Award.²³² Brainard noted:

Between 2012 and 2014 I recall what appeared to be a growing movement during Conference Calls hosted by TSA Leadership indicating there were certain positions in TSA that were subject to relocation in TSA-OSO. This messaging grew substantially more frequent in late 2013. Some Federal Security Directors had indicated to me they suspected an effort was underway to force out some of the older and longest serving Federal Security Directors.²³³

Brainard’s understanding at the time was “reassignments or relocation could be applied to a number of situations such as voluntary participation in the senior leadership development program (SLDP), the elimination of an office or program, or for poor performance,” but did not believe he was likely to be selected for such a reassignment given his operation had already been reorganized into the prevailing state-hub model and he had a strong performance record.²³⁴ Despite this, Brainard was reassigned.

²³⁰ EEO Complaint HS-TSA-01345, filed May 22, 2014 by Jason Brainard, amended by memorandum Jul. 18, 2014 at 2. [hereinafter Brainard Amendment to EEO Complaint].

²³¹ Brainard Amendment to EEO Complaint at 2.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

1. TSA Reassigned Brainard from Des Moines, IA to Portland, ME Despite Brainard Explaining This Would Cause Him Severe Hardship

During the “leadership succession planning initiative” in 2013 and 2014, Brainard submitted his resume as requested, indicating his desire to remain in Iowa, and did not list other duty stations of interest, explaining his family situation.²³⁵ On April 14, 2014, Regional Director Robert Ball, Brainard’s supervisor, called him. Ball informed Brainard he was calling at the request of TSA headquarters to ask about Brainard’s three duty preferences because he had only selected his duty station in Des Moines. According to Brainard, “[Ball] advised me that he wasn’t aware I was selected for reassignment but because I was ‘within that window of time’ it may be a good idea to have other locations named.”²³⁶ Brainard discussed his family situation and reaffirmed his desire to remain in Iowa. Following the call, Brainard e-mailed Ball to identify Wichita, KS and Indianapolis, IN as his other choices. Brainard made clear to Ball a reassignment would pose severe hardship to his family stating, “I was both concerned and emphatic about our situation and stressed the fact that financially we were not in a position to support multiple households in different states and I informed him that such a situation would mean financial disaster to my family.”²³⁷

On May 9, Ball called Brainard to inform him he would receive a directed reassignment to Portland, ME. To Brainard, “this news came as a complete shock.”²³⁸ Brainard testified Ball indicated the directed reassignments were being used as a means of coercing employees to leave the agency. He stated:

Q. Was that the only notice you received prior to this TSA broadcast?

A. First time I had ever heard about it.

Q. And how much explaining did he do of why this was happening?

A. I said – well, first I asked him, was it Portland, Oregon. He said, Portland, Maine. I said, we have operations in Portland, Maine? He said, yes. I said – I – I was pretty, I guess, surprised. I did not expect it. I said, I – I’ve never asked to go to Portland, Maine. I turned in a request for something in the midwest. Why am I going to Portland, Maine? Who made this decision? And during the course of our conversation in trying to find out how this had happened he had informed me that they had tried to implement directed reassignments approximately two to three years prior in an effort to get people to leave the agency.²³⁹

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 2-3.

²³⁸ *Id.* at 3.

²³⁹ Brainard Tr. at 38.

On the phone call Brainard also described his family’s circumstances and the hardships a reassignment to Maine would create. Ball said he would raise these issues with Hoggan. Brainard testified:

- Q. On the phone call with Robert Ball did he discuss any of those factors you mentioned in Exhibit 1 as, you know, your circumstances or hardships?
- A. I – I had explained these things to him. He said he would pass it up through his chain to Kelly Hoggan. We were not to interface with Kelly Hoggan. We were to interface directly through our regional directors.²⁴⁰

He also requested to be moved to an international Transportation Security Representative (TSAR) position in the Office of Global Strategies—a position with more benefits—instead of to Portland, Maine.²⁴¹ Ball informed Brainard he had checked with TSA leadership and there were no TSAR vacancies available. In early June 2014, however, vacancies were posted for the TSAR positions in London—Brainard’s preferred choice—and Berlin.²⁴²

On May 14, 2014, Brainard received a Notice of Directed Reassignment to Portland, ME. The notice included a 10-day deadline to accept the reassignment and a 60-day deadline to relocate. The notice stated, “[i]f you decline the directed reassignment, your declination is considered final and may not be changed. If you decline, or accept but fail to report for duty, TSA may initiate action to separate you from the Federal service for failure to accept a reassignment outside the commuting area.”²⁴³

Next to the space declining the assignment on the decision form was a clause stating, “I understand that, based on this election, action may be initiated to separate me from Federal service.”²⁴⁴

2. TSA Rejected Brainard’s Requests for Accommodations to Mitigate the Reassignment’s Impact

Brainard spoke with the outgoing FSD in Maine, who had been reassigned to Milwaukee. The Maine FSD informed Brainard he would likely decline the reassignment to Milwaukee and instead retire. Brainard would have preferred a reassignment in the Midwest to Maine.²⁴⁵ On May 16, he e-mailed Ball and informed him he intended to accept the reassignment, but also requested to be reassigned to Milwaukee in the event it was left unfilled. Ball informed him there was no process for changing location preferences but indicated he would communicate

²⁴⁰ *Id.* at 39–40.

²⁴¹ *Id.* at 56–57.

²⁴² Brainard Amendment to EEO Complaint at 3.

²⁴³ Memorandum from Karen Shelton Waters, Ass’t Adm’r, Transp. Sec. Admin. to Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin., *Notice of Directed Reassignment* (May 14, 2014).

²⁴⁴ *Id.*

²⁴⁵ Brainard Amendment to EEO Complaint at 4.

Brainard's request for consideration. Ball also noted, "[t]here very well may be backups already stacked that the ERC or leadership have pre-selected."²⁴⁶ In June 2014, an AFSD with less experience than Brainard was promoted to be the Milwaukee FSD.²⁴⁷

Brainard spoke with three other K-Band FSDs who had been directly reassigned and concluded TSA was "employing the same tactics in an effort to force the resignation or retirement of other senior Federal Security Directors by assigning them to short-notice long distance locations they too did not select as a preference."²⁴⁸ These included Jacksonville FSD Ed Goodwin, who was reassigned to replace Brainard in Iowa; Portland, ME FSD Robert Dyer, who was reassigned to Milwaukee, and whom Brainard was reassigned to replace; and Milwaukee FSD Louis Traverzo, who was reassigned to Little Rock.²⁴⁹

According to Brainard, these reassignments did not serve any business need for TSA. He testified:

The only thing I would offer is that where they wanted to send federal security directors there was no vacancy. Additionally, everybody at that location had the same experience that everybody else did. There was no business reason to move these people.

Mr. Dyer received a 5.0 on his last evaluation. He achieved excellence. Additionally, the operation in Maine is significantly smaller than the operation in Iowa. Six airports versus eight. It's probably 120 employees less. And in terms of responsibility, it's quite a bit less. The Iowa operation is much larger and much more complex. So, it just didn't –

To get in that minute, one of the things that certainly bears relevance is the fact that when the Jacksonville operation went to Des Moines that was going to be about the same size of operation. Arkansas significantly smaller than Wisconsin for Mr. Traverzo. There was no business need whatsoever to move that skill set. Specifically it talks about needing that experience at that situation. That's completely untrue.²⁵⁰

On May 20, 2014, Brainard received Permanent Change of Station documents from TSA's Business Management Office and noticed discrepancies between those authorizations for support and the ones in the documents he had received with the May 14 Notice of Directed Reassignment. He notified Ball and spoke with several staffers in TSA's Business Management Office. On a May 23 (the date of the decision deadline) conference call, Brainard and other FSDs were informed the attachment included with the Notice of Directed Reassignment was outdated

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 4–5.

²⁴⁸ *Id.* at 5.

²⁴⁹ *Id.* at 5–6.

²⁵⁰ Brainard Tr. at 57–58.

and had been issued mistakenly.²⁵¹ According to Brainard, the new policy eliminated tens of thousands of dollars of his relocation support.²⁵²

On the call, the FSDs were told, in order to obtain support, they would have to submit a written request for consideration of expenses not covered within the 60-day relocation window.²⁵³ Brainard directly e-mailed TSA Administrator John Pistole to request his assistance, telling him the news of the directed reassignment “was devastating for my family,” detailing the financial hardship it would cause and the additional difficulties the PCS issue created.²⁵⁴ Brainard later noted “TSA did support several aspects of the PCS move but only after submitting a justification request and placing me under additional great pressure and stress.”²⁵⁵

Brainard accepted the reassignment on the May 23 deadline. On June 25 he requested an extension of his reassignment after learning his replacement in Iowa would not arrive until September 2014 at the earliest. This request was subsequently denied.²⁵⁶ He testified:

Q. What is this extension you were asking him for?

A. It was an extension to report to my directed reassignment. They actually – they essentially didn’t give us a lot of lead time to report to my directed reassignment. My – my replacement, Ed Goodwin, I had spoken with him. He had no intention of moving. And I – and I had asked –

Q. He didn’t ask for Iowa?

A. Oh, no. No. No. No. And if you speak with him you’ll certainly know that for sure.

But Mr. – Mr. Goodwin said he wasn’t coming. And I – I had mentioned to Bob that if – if my replacement is going to be stalled, can I get time on this to get relocated. They denied that and they also TDY’ed in a temporary federal security director from Louisville, an assistant federal security director, named Luz Ponce. Her name is spelled L-U-Z, P-O-N-C-E. And Luz was assigned to Iowa as the acting federal security director on TDY for nine months.

Q. So why wouldn’t they grant you the extension?

²⁵¹ Brainard Amendment to EEO Complaint at 7.

²⁵² E-mail from Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin., to John Pistole, Adm’r, Transp. Sec. Admin. (Mar. 23, 2014, 12:26 p.m.) (on file with the Committee).

²⁵³ Brainard Amendment to EEO Complaint at 7.

²⁵⁴ E-mail from Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin., to John Pistole, Adm’r, Transp. Sec. Admin. (Mar. 23, 2014, 12:26 p.m.) (on file with the Committee).

²⁵⁵ Brainard Amendment to EEO Complaint at 7–8.

²⁵⁶ *Id.* at 8.

- A. There was no logical reason not to grant me an extension. They – they – instead they opted to send me TDY in temp quarters three months and move Ms. Ponce into temp quarters for nine months. There was no reason to – to deny me the opportunity to stay. There was no permanent federal security director named. And the federal security director in Maine, Robert Dyer, had indicated he had planned on working at least one more year.
- Q. So would you say there was any operational need to get you out to Maine –
- A. None – none – none whatsoever.²⁵⁷

Brainard indicated TSA’s argument that his expertise was necessary to lead the operation in Maine was undermined by the fact the agency left it vacant for an extended period once he departed in May 2015. He stated:

When I went to Maine, the language that’s in the directed reassignment talks about my skill set being needed. It was critical that I was there. I left Maine in May of 2015. From May 2015 to current day, that FSD position is still vacant. As a matter of fact, they’ve chosen not to refill it.

So they did not need my experience that much that they did not refill the position. The operation has not changed. The operation is still federalized. There are still six airports and the responsibility is still the same. They still have not filled that position.²⁵⁸

3. TSA Ultimately Granted Brainard a Settlement to Take Position in Kansas

In May 2014 Brainard initiated an EEO complaint against TSA. On October 25, 2014, Brainard e-mailed Deputy Administrator Carraway requesting to return to Iowa and urging Carraway to end the use of directed reassignments.²⁵⁹ On November 25, 2014, Carraway suspended the “Tours of Duty Initiative.”

Brainard e-mailed Carraway later that day to reiterate his interest in returning to Iowa.²⁶⁰ On approximately December 23 or 24, Brainard spoke with Carraway on the phone. Brainard noted, “I had actually spoken to Mr. Carraway in December of 2014 and he was – said he was going to be out of the country. I said, don’t give up hope. He said, I haven’t given up hope, neither should you and we’ll talk about it when I get back.”²⁶¹

²⁵⁷ Brainard Tr. at 51–52.

²⁵⁸ Brainard Tr. at 75.

²⁵⁹ E-mail from Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin., to Mel Carraway, Deputy Adm’r, Transp. Sec. Admin. (Oct. 25, 2014, 4:12 a.m.) (on file with the Committee).

²⁶⁰ E-mail from Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin., to Mel Carraway, Deputy Adm’r, Transp. Sec. Admin. (Nov. 25, 2014, 3:25 p.m.) (on file with the Committee).

²⁶¹ Brainard Tr. at 96.

On January 7, 2015, Seattle DFSD David Dailey was announced as the new Iowa FSD. Dailey called Brainard that day to tell him he had sought to return to the Midwest, but not Iowa specifically and had been caught off guard by the timing of the announcement. Dailey explained Hoggan had offered him the Iowa FSD position and informed him Brainard would not be allowed to return to his old position.²⁶² Brainard testified:

- A. I received an e-mail from David Dailey who was the deputy federal security director in Seattle, asked if I had time for a call. I spoke with him. He told me that he had been contacted by Kelly Hoggan, the assistant administrator for operations. He had been offered the position in Iowa as the federal security director. He had said to Mr. Hoggan, I thought Jay was trying to get back to Iowa. And he told him, that's never going to happen. And there was no reason why he would prevent me from going back to Iowa.

I later learned that he had actually talked with Mr. Dailey early December and had arranged to have Mr. Dailey show up to Iowa short notice, in two weeks, and facilitate a move as quickly as possible.

- Q. How did you learn that?

- A. Because he showed up and moved to Iowa in two weeks. That's never happened.²⁶³

Brainard e-mailed Carraway that day to inform him of the situation and seek clarification on what occurred. Carraway responded he was traveling internationally but would call Brainard when he returned. He also wrote, "I am fully aware of your situation and I have given you my advise (sic). I have not wavered nor should you."²⁶⁴

In January or February 2015, TSA Acting Deputy Administrator Mark Hatfield contacted Brainard to try to settle with TSA and take an open FSD position in Kansas. He stated:

- A. So, as soon as the January announcement came out for the new federal security director in Iowa I sent him an e-mail and said, hey, what's going on? I just saw this come out today. Does this mean that this is off the table? And his response was, I haven't given up hope, neither should you. There is a written record with that. And then at some point I talked with the Deputy Administrator Mark Hatfield.

²⁶²E-mail from Mel Carraway, Acting Adm'r, Transp. Sec. Admin., to Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin. (Jan. 7, 2015, 2:04 p.m.) (on file with the Committee).

²⁶³ Brainard Tr. at 94.

²⁶⁴ E-mail from Mel Carraway, Acting Adm'r, Transp. Sec. Admin., to Jason Brainard, Fed. Sec. Dir., Transp. Sec. Admin. (January 7, 2015, 2:04 p.m.) (on file with the Committee).

- Q. What were the circumstances of this conversation?
- A. I had e-mailed Mr. Carraway and said, hey, any update on this? And Mark had referred out to me by phone and said, hey, I'd like to try and make this right. And -- so then, that's when I got introduced to Mr. Colon, the attorney. And the only thing that I had asked for was to redirect the package they initially offered me to Kansas.
- Q. So when he said, I'd like to make this right, had you initiated the conversation with Mr. Hatfield or he contacted you?
- A. Mr. Carraway had Mr. Hatfield contact me.²⁶⁵

Brainard knew there was an open FSD position in Kansas and reached a written settlement with TSA to be moved there. He testified:

- A. At that point, I knew that Keith Osborn was retiring. He had signed a non aggression agreement with the agency that he would leave in May of 2015 and Kansas was the next best thing to getting back to duty assignment.
- Q. And then what happened?
- A. Mr. Colon contacted me and I said, I'd like to get back to the midwest. And then he asked me for the terms of the settlement and I told him, I just want my PCS reset and directed to Kansas.
- Q. And did he use the term "settlement"?
- A. Yes. And there's a settlement agreement that I have, a written settlement agreement. I don't have it, but I can make it available.
- Q. You have not provided that to the committee?
- A. No, ma'am.
- Q. Okay. And then you were asked to sign an NDA?
- A. What is an NDA?
- Q. A nondisclosure agreement.
- A. That's part of the settlement agreement. I believe it says that I couldn't discuss the terms of the agreement and then it -- there's a

²⁶⁵ Brainard Tr. at 98.

legislative clause, but I had to request something from legal in order to get it approved to discuss.²⁶⁶

According to the settlement, Brainard returned to the Midwest as the FSD in Kansas contingent on withdrawing his EEO complaint.²⁶⁷

4. TSA's Reassignment of Brainard Cost Taxpayers Over \$100,000

Although he was able to resolve his case, Brainard stated his reassignment cost taxpayers over \$100,000. He testified:

A. The – this is a Relocation Authorization. What money TSA had allocated for my PCS move.

Q. And what was that amount?

A. It shows here \$113,000.00.

Q. So was that the full cost of moving you from Iowa to Maine?

A. Actually, when I got to Maine – and this gets into the conversation I had with the acting administrator, Mel Carraway. I had filed an EEO against the agency. And part of my dismissing the EEO, I asked them to redirect my PCS to Kansas. They asked if I had any other requests for a settlement. I told them I just wanted to be treated fairly because ultimately this has come on the taxpayers' bill.

So I asked them to reset my PCS and move me to Kansas. And I believe there were some additional expenses incurred on that, but I did not get any money from the agency outside of what is in the PCS package. I did not ask for a cash settlement or anything else.

Q. So how much do you think it cost the government to make that move?

A. I don't have that number on the top of my head. I can tell you that every federal security director that received one of these that took the PCS was in excess – earmarked in excess of 100,000. So you're talking in upwards of a quarter million dollars for one particular move between two federal security directors.

Mr. Dyer was to move to Wisconsin. He was offered the same package. Mr. Traverzo moved from Wisconsin to Arkansas. He was offered that package. The FSD in Charlotte was sent to Los

²⁶⁶ *Id.* at 99–00.

²⁶⁷ *Id.*

Angeles. He was offered that package. His wife was sent from Los Angeles to Washington. She was offered that package. The – the FSD in West Virginia was sent to San Diego. He was offered that package. So all of the FSDs would have received a similar package or they had the option of taking a one-time cash amount.

Q. And then, during these period of years, would you say that many people were moved around every year?

A. There were a lot. I can't recall the exact number. I can tell you that most of the federal security directors and the deputy federal security directors who left were as a result of directed reassignments.²⁶⁸

5. *Other FSDs Were Coerced to Retire Early in Exchange for Being Allowed to Remain in Their Positions for a Limited Time*

Brainard also noted FSDs were coerced to leave the agency by being granted limited extensions in their positions in exchange for retiring at the end of this period. He testified:

Q. Can you explain the meaning of this e-mail that you received on June 17th, 2014 from Karen Shelton Waters?

A. Yeah. So this e-mail was a national announcement. And this, basically, went out and gave people the option of voluntary early retirement. I took particular exception to the statement at the bottom of the first page that said, "Pressuring or coercing employees who are eligible for voluntary early retirement to apply against their will is a prohibited personnel practice." And the reason I did is because I knew there were a number of federal security directors who were given the option to stay at their duty station had they signed an agreement to retire one year later. That would be the FSD in St. Louis, Bill Switzer. That would be the FSD in Wichita, Keith Obsborn. And that would have been the FSD, I want to say in Houston, Mike Scott.

The FSD in Maine, Bob Dyer who was there, he was served a notice. And I believe I had turned that in as an exhibit, but those FSDs had signed a written agreement or what I call a non-aggression pack with the agency that they would be allowed to stay at their duty location one additional year with the caveat that they retire from federal service.

Q. So from your understanding of this voluntary early retirement authority – and it says "new," right? So it's a new program here.

²⁶⁸ *Id.* at 53–54.

- A. They've had Vera a couple of times in TSA. I can't recall specifically when those years were. It's not often, but you know, this came out. Specifically, the – the verbiage down there struck me as odd because I know that a number of federal security directors had to sign an agreement that they would retire. And to me that's, either you retire from federal service or you're going to move.²⁶⁹

6. Senior TSA Leaders Acknowledge Brainard's Reassignment was Inappropriate

TSA Chief Counsel Francine Kerner stated she did not believe Brainard should have been reassigned nor was there a sensible business case for doing so, but maintained the reassignment was legal because it was not an act of retaliation. She stated:

- Q. I'll just ask about a couple of other individuals, to the extent that you have knowledge about them – they had directed reassignments – and whether you believe it was appropriate.

Jay Brainard was reassigned from Iowa to Maine. Are you aware –

- A. I am aware. I know Mr. Brainard. We saw one another just recently at the FSD summit, at the Administrator's summit in November. I happened to sit with him at the same table. We had a wonderful exchange.

And, no, I do not think he should have gotten that directed reassignment. But was I asked in advance? No. Was it legally acceptable for him to get that directed reassignment? Yes. Do I think it made sense? No.

- Q. What's the distinction between whether or not it makes sense and whether or not it was proper, in your mind? Because you've cited a couple of examples where you think –

- A. Because it all comes down to what the decisionmaker has in the way of a business justification. And I don't know that the business justification really made sense with Brainard. But I think that they needed an FSD at a different location. He was available. He was a good FSD; he's still a good FSD. He was moved to a different location. That's within the scope of the authority of the people who are making the decision.

²⁶⁹ *Id.* at 49–51.

If they're not making the decision as a prohibited personnel matter – in other words, if it's not retaliatory for a protected disclosure – then, even if it results in an individual choosing to leave Federal service rather than move, you know, that's the choice that the individual makes when faced with a directed reassignment.²⁷⁰

Hatfield, however, stated Brainard's reassignment from Iowa to Maine was inappropriate. The reassignment had no positive impact on security, and may have been an act of retaliation by Hoggan for Brainard's outspoken concerns of the agency's emphasis on the speed of screening over the quality of screening. He testified:

Q. So you mentioned people coming in and out of Mr. Hoggan's favor, directed reassignments. Can you give examples of some people who were out of Mr. Hoggan's favor and were therefore moved?

A. Let's see. Well, one in particular that I had direct involvement when I first got there was – gosh. He was the Federal Security Director from Iowa, and he had been directed, reassigned to Portland, Maine, and was separated from his family and had served there for some time, I think over a year.

Q. Do you know how he was out of Mr. Hoggan's favor?

A. I don't.

Q. And –

A. Well, I take that back. He was very outspoken. He was a very outspoken FSD and would often raise issues at the conferences in front of the whole group and was never bashful about challenging corporate policy or direction in – I would say in a constructive way.

Q. What issues, security issues, did he raise that were challenging Mr. Hoggan?

A. Well, I think one that he and many of us shared in the FSD ranks was the extraordinary emphasis on speed over quality of screening and this what many felt was an unreasonable reliance on a metric system that was oftentimes beautiful in full-color presentation on slide decks but was very detached from the reality of the front line where the actions were taking place.

Q. Did Mr. Hoggan's movement of this individual from Iowa to Maine affect security at all? Did it improve security? Did it decrease security?

²⁷⁰ Kerner Tr. at 43–44.

A. Not by any observation I could make.²⁷¹

In testimony before the Committee, former TSA Administrator Peter Neffenger ultimately acknowledged Brainard's reassignment had been inappropriate. He testified:

Mr. Gosar. Well, I am glad you went that way because I would like to illustrate Mr. Brainard, who testified before this committee, that he was issued a directed reassignment from Iowa to Maine in 2014 with no apparent need or justification even though the move cost him significant financial hardship. His replacement and the person he was replacing were issued similar reassignments. In your opinion, was this an appropriate use of directed assignment, and if so, what is your justification?

Mr. Neffenger. If I may, it was not an appropriate use of directed reassignments, and that's why I changed the policy.²⁷²

Brainard's experience illustrates how senior TSA leaders improperly issued directed reassignments and why Carraway suspended the practice in November 2014. Brainard was an excellent employee by the agency's own evaluation. His reassignment served no legitimate purpose, and the agency ignored evidence that proceeding with his reassignment would subject him and his family to considerable hardship.

TSA officials, however, continued to improperly use directed reassignments even after the Deputy Administrator announced the practice would end.

D. TSA Reassigned Andrew Rhoades from Minnesota to Florida

Andrew Rhoades, who serves as an AFSD at Minneapolis-St. Paul Airport, received a directed reassignment on February 19, 2015. The directed reassignment came after Carraway's November 2014 suspension of the Tours of Duty Initiative, including the widespread use of directed reassignments. When Rhoades's directed reassignment was brought to Carraway's attention after having already been issued, Carraway confirmed Rhoades's directed reassignment was inconsistent with his suspension of the practice.

Rhoades's directed reassignment was notable, because it was issued by Minneapolis-St. Paul FSD Cliff Van Leuven rather than a senior official from TSA's Office of Security Operations as was normally the case. Mark Hatfield, TSA's Acting Deputy Administrator at the time, confirmed this was inconsistent with TSA's procedures for issuing directed reassignments.

²⁷¹ Hatfield Tr. 137–38.

²⁷² *Examining Management Practices and Misconduct at TSA: Part II, Hearing before the H. Comm. On Oversight & Gov't. Reform*, 114th Cong. (May 12, 2016) at 57–58 [hereinafter *TSA Hearing Part II*].

1. Andrew Rhoades Identified and Highlighted Security Vulnerabilities and Wait Time Falsification at Minneapolis St.-Paul Airport

Rhoades joined TSA in 2002 as an AFSD for Screening at Minneapolis-St.Paul Airport. After briefly serving as DFSD in Las Vegas, Rhoades returned to Minneapolis, where he is currently AFSD for mission support. Prior to his reassignment, Rhoades had consistently received strong performance evaluations throughout his career at TSA. On TSA's five-point scale, Rhoades said he generally scored "in the mid to upper fours," which he characterized as "respectable."²⁷³ Beyond this, Rhoades had a history of identifying and reporting security deficiencies and other problems at the airport, including failures to properly tag screened baggage and falsified wait times.²⁷⁴

As AFSD in Minneapolis, Rhoades noticed security officers were not tagging checked bags to document that they had been screened as required. Rhoades testified:

What had happened was spring break [2014]. It – what we do is we traditionally go to the airport and volunteer to schlep bags. It's a way for managers to demonstrate to the airport employees that, you know, we're not too good to do what you do. And at spring break I was taking an oversized bag to what's called the CTX 80 and it was screened.

So usually it's – you put it in this big screening piece of equipment and at the end you're supposed to take a bag sticker and put it on the bag tag. Because if something were to happen and we needed to be able to – in what's called our AOSSP, it's a policy that says you have to have some form of identification that the TSA has screened that bag. Well, if you can't prove that, technically you have to dump all the bags off an aircraft, which is a significant, emotional event. So you put the tag on there.

When I asked the – the security officer, where's the tag during spring break he said, we don't do that anymore. I said, what do you mean you don't do that? And I didn't want to get into an argument with him, but I know in the AOSSP we are required to do that. I know because my office orders these tags. Remember, the Office of Finance Logistics reports to me. And then Mike Stone, one of my managers said, Drew, they're telling us to throw all these bag tags away. They don't need them anymore.

So after that I went into a meeting and said – just AFSDs and Cliff and – and at the time, his other deputy. And I said, hey, we have a problem. I was volunteering. They told me we don't do bag tags. This is against policy. And they said, we don't want to talk about it here. And what had happened was, after the meeting convened, Cliff, his deputy and only George Beech went into a separate, smaller meeting. And then, very quickly an e-mail was sent saying, hey, we need to put bag tags back on.

²⁷³ Rhoades Tr. at 17.

²⁷⁴ See generally Rhoades Tr.

But that had been going on for a while because – I mean, I don't know how long they stopped doing that, but I only happened to notice it when I was screening – not screening bags, but helping with the bags.²⁷⁵

Rhoades explained MSP's practice of not using the bag tags presented serious security risks to aviation security. He noted planes should not be allowed to leave an airport without their checked baggage being matched to passengers, which requires the bags to be properly labeled. He testified:

Had I not wandered on those bag tags and just volunteered at spring break, that could be going on right now. So let's hypothetically say you four are riding on – on a flight to DCA, and we have what's called positive passenger bag match. That means let's say, [someone], you have an emergency and you cannot fly, but your – your bag was put on the aircraft because at the time we didn't know that you weren't going to make the flight. Well – and let's say [someone else's] bag goes on there, but – but we don't know that it's been screened because it doesn't have a tag.

So someone's got to pull your bag off because terrorists will say, oh, I'll just put my bag on there. I won't fly. And they'll blow up the plane. That's why a passenger has to be matched with his or her bag on that flight. If you're not on that flight your bag does not go on that – on that aircraft, but let's say [someone's] a true bad guy and his bag was never screened. We need to be able to prove that all bags on that flight have been screened.

So let's say there are no bag tags on the whole flight because we've stopped. There is no way we can prove which bags have been screened and which bags have not been screened. It's a huge security violation or a security problem. And if – and let's carry that one step further. If we can't prove all the bags at the Minneapolis-St. Paul airport have been screened, you know what we should do? No aircraft should leave that – that airport. None. That is a huge security shortfall.²⁷⁶

Rhoades had also reported to his chain of command security checkpoint wait times were being falsified at Minneapolis-St. Paul Airport. He stated:

Q. Earlier you mentioned fabricating wait times.

A. Yes.

Q. Can you provide a little bit more detail on what issues that you raised with regards to that matter?

A. Yes, I'd be happy to.

²⁷⁵ *Id.* at 110–12.

²⁷⁶ *Id.* at 114–15.

The first – well, before we begin about fabricating wait times, we had what's called an FSD Office of Inspections. The Office of Inspection comes in and they interview select people throughout the whole agency. It's like a pulse check – like a health check. And there was a report issued in – give me a second.

There was a report I think in 2013. I have a copy of that report and I can provide it. I don't think I've provided it to this committee, but in there a supervisor from the checkpoint says, we believe the wait times that we report in are being falsified by managers. So that's the first record of it.

Around March 1st, 2000, I believe it was '14, a TSM by the name of Brian Stout came up to me. What's important about Brian is he's the husband of Denise Stout who used to be my administrative officer. So he was looking to me for guidance. I could tell he was conflicted. He said, Drew, I need to talk to you about an incident that happened at the airport. And what had happened was he was viewing CCTV, closed circuit TV, to – to estimate the wait times. He had counted 18 minutes into a wait time report and then he got called away because there was an incident. And another manager came in and started collecting after he had tabulated 18 minutes.

Q. When was the 18 minutes –

A. It was –

Q. – brought up?

A. I believe it was March 1st. I thought it was 2014. So he – he collected 18 minutes. And then this other manager collected, I believe, five.

What's important at the time is, any wait time report over 20 minutes needed to be reported to the headquarters because the headquarters was really sensitive of having long wait times. At that time it was only 20 minutes. Well, what got reported was only the 18 minutes that he counted. And he brought that up to his managers, who did nothing about it.

So, he was approaching me asking for advice. I said, you need to bring this up, Brian. I mean, you can't let this go. I approached David McMahon, the deputy, and I said, Dave – I described in detail everything I've described to you and his quote was, at least we aren't as bad as Chicago. So, instead of investigating it, instead of getting

to the bottom of it, instead of saying, we can't allow that, his response to me was, at least we're not as bad as Chicago. Becky Roering also heard him say that.

Wait – wait times routinely are falsified in Minneapolis-St. Paul airport. That's one of the reasons, candidly, why I don't get wait time reports 'cause they know if I did get it and I can prove it, I'd call it to their attention.²⁷⁷

Rhoades stated he reported this issue to his managers. He testified:

Q. So you mentioned baggage tags –

A. Yes.

Q. – as well as the wait time fabrication –

A. Uh-huh.

Q. – is that correct?

A. That is correct.

Q. And you raised those issues to your managers?

A. I did.²⁷⁸

Rhoades testified he encountered retaliation after reporting the bag tag issue by being excluded from the distribution of certain information. He stated:

Q. And then earlier you mentioned that you were excluded from receiving certain information and removed from certain meetings; is that correct?

A. Meetings with the Somali community, but mostly omitted from what's called snapshots or these reports from our coordination center that would highlight things about excessive wait times or a missed bag pull or a breach at checkpoint whatever.

Q. And then, to your knowledge, when did – when did that – when did those two things occur?

A. I stopped getting coordination or snapshots shortly after May 25th, 2014 when I was the acting deputy at the time. And then I submitted

²⁷⁷ *Id.* at 102–04.

²⁷⁸ *Id.* at 110.

a written report saying, we missed – I think it was – I think it was over 25 bags, but we missed all of these bags that went on the aircraft that were unscreened. What we should have done is we should have – technically, we should have shut down that airport, but I will tell you that would cost millions of dollars. And no one wants to go on record as saying this occurred. So when I submitted that AAR, that written report saying, this occurred, I never got reports after that.

Q. And how did you find out that this was occurring, that you were removed from –

A. Omitted?

Q. Omitted.

A. Because Becky Roering would say, Drew, here's another report you're not getting. She would show it to me.

Q. Did the FSD at the time or deputy FSD ever inform you of your exclusion?

A. It just – it just never happened. They never said, Drew, you know, you work in budget and finance, you don't really need to see this. Because prior to that all AFSDs – because again, I used to be the AFSD for screening. So I would hope that I could add some value with respects to maybe helping them if they do step outside of policy or to say, maybe there's a better way, or just process improvement.

Q. And the FSD at the time was?

A. Cliff Van Leuven.²⁷⁹

Rhoades raised the issue with Van Leuven, who called the matter an oversight. Rhoades did not find this explanation credible. Excluding him from this information harmed Rhoades's ability to perform his duties and weakened the overall security of Minneapolis-St. Paul Airport. He testified:

Q. Cliff Van Leuven. And you never raised the issue with them about your omission?

A. Oh, yes, I do.

Q. Okay.

²⁷⁹ *Id.* at 112–13.

A. Yes, absolutely.

Q. Would the omission create difficulties within your job?

A. Indirectly, yes. Like, let me give you an example. Recently I was designated a deputy. It was some time within the last six months. And an incident occurred at the airport. I never got notice of it. So I sent a note to Cliff Van Leuven and David McMahon and I said, look, if I'm -- if you're going to place me in the deputy federal security job you cannot exclude me from incidents because I'm the approving authority on -- on various things that occur. And it's -- it's -- it weakens our security posture if they're going to place me as the deputy and then omit me from any of the reports. And I -- I submitted that to them in writing.

Q. What was -- to your knowledge, what was the reaction from Van Leuven and his deputy after receiving that information?

A. Oh, it was just a simple oversight. We didn't mean to. Nothing is a simple oversight. Nothing is a simple oversight.²⁸⁰

2. Rhoades Was Issued a Directed Reassignment Due to Suspicions He Was Providing Information to the Media

TSA eventually issued Rhoades a directed reassignment. Evidence indicated TSA—specifically Cliff Van Leuven—blamed Rhoades for a series of embarrassing leaks to the media, a charge Rhoades categorically denied. Rhoades's directed reassignment was retaliation for those leaks.

The Notice of Directed Reassignment itself did not provide a reason for the move,²⁸¹ which Rhoades found unusual. Rhoades testified:

Q. And on what basis did Mr. Van Leuven use for your directed reassignment?

A. As the -- when I read the note I, candidly, could not find a basis or at least one that I understood. It -- it appeared to be just, policy says this. Usually you have to cite a basis. The -- the office is going through realignment. We need an AFSD support here. But I will note, there is a very big difference between the February 19th memo and the January 23rd, 2015 recommendation that I would like to at least be asked about because those -- those differences clearly dispel

²⁸⁰ *Id.* at 113–14.

²⁸¹ Memorandum from Clifford Van Leuven, Fed. Sec. Dir., Transp. Sec. Admin. to Andrew Rhoades, Ass't Fed. Sec. Dir., Transp. Sec. Admin., *Notice of Directed Reassignment and Change in Duty Station* (Feb. 19, 2015).

why I was being reassigned. The January 23rd, 2015 memo to Kelly Hoggan.²⁸²

Rhoades eventually obtained, through a FOIA lawsuit, a January 23, 2015 memorandum from Van Leuven to Hoggan requesting the directed reassignment.²⁸³ This document outlined Van Leuven's reasons for the reassignment.²⁸⁴

Van Leuven wrote “[w]hile Mr. Rhoades leads a team that produces above average output, his leadership capacity is limited here by enduring negative perceptions, a lack of confidence/trust within his own staff, and evident contacts or loyalties to past leadership.”²⁸⁵ Van Leuven wrote “[a]s new TSA-Minnesota leadership works to change the leadership culture, Mr. Rhoades’s presence works counter to the leadership change needed in this environment.”²⁸⁶ Van Leuven also wrote Rhoades “has capacity,” but “that capacity is not being realized here, and it is optimal for both the employee’s professional growth and the agency to reassign the employee to another duty station.”²⁸⁷ Van Leuven wrote, “[i]t is my recommendation that he would be better utilized by the agency in a position that would sever past loyalties, provide a fresh start with a new leadership team and utilize his talent and leadership in a new and more effective way.”²⁸⁸

²⁸² Rhoades Tr. at 23–24.

²⁸³ *Id.* at 23–25.

²⁸⁴ *Id.* at 23–24.

²⁸⁵ Memorandum from Clifford Van Leuven, Fed. Sec. Dir., Transp. Sec. Admin. to Kelly Hoggan, Ass’t Adm’r for the Office of Sec. Operations., Transp. Sec. Admin., *Request for Directed Reassignment* (Jan. 23, 2015).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*



Transportation
Security
Administration

MEMORANDUM FOR: Kelly Hoggan
Assistant Administrator
Security Operations

THRU: Darby LaJoye
Deputy Assistant Administrator
Security Operations

THRU: Barbara Powell
Director, Field Operations
Security Operations

THRU: Robert Ball
Regional Director, Region 3
Security Operations

FROM: Clifford Van Leuven
Federal Security Director MSP

DATE: January 23, 2015

SUBJECT: Request for Directed Reassignment

PURPOSE:

This request is for an agency directed reassignment for Andrew Rhoades, Assistant Federal Security Director – Mission Support (AFSD-MS), located at MSP, in order to promote agency efficiencies.

BACKGROUND:

While Mr. Rhoades leads a team that produces above average output, his leadership capacity is limited here by enduring negative perceptions, a lack of confidence/trust within his own staff, and evident contacts or loyalties to prior leadership. Regrettably, the negative perceptions are in part an enduring vestige from Mr. Rhoades' tenure leading the Screening workforce at MSP and issues that arose from his leadership style.

As new TSA-Minnesota leadership works to change the leadership culture, Mr. Rhoades' presence works counter to the leadership change needed in this environment.

Mr. Rhoades has worked at TSA since standup in 2002, and has capacity, however, that capacity is not being realized here, and it is optimal for both the employee's professional growth and the agency to reassign the employee to another duty station.

It is my recommendation that he would be better utilized by the agency in a position that would sever past loyalties, provide a fresh start with a new leadership team and utilize his talent and leadership in a new and more effective way.

RECOMMENDATION:

Request AFSD MS Andrew Rhoades be reassigned to a commensurate position in TSA.

Rhoades explained the language about “loyalties to past leadership” was a reference to his relationship with former Minneapolis FSD Ken Kasprisin, who had previously served as TSA’s Deputy Administrator and Acting Administrator. Van Leuven also suspected Rhoades was responsible for a series of unflattering leaks to local media about TSA’s operations at the airport. Rhoades denies any involvement with the leaks. He testified:

Q. “Loyalties to prior leadership,” can you – to your knowledge, do you know what that would –

A. I do.

Q. Okay. Can you explain.

A. They’re specifically insinuating my relationship with Ken Kasprisin. At the time Mr. Kasprisin was on Fox News being interviewed about the differences between privatized airports, security. And, of course, he held the position of acting TSA administrator. So what the TSA thought or Mr. Van Leuven, Kelly Hoggan and Robert Ball thought was I was feeding Mr. Kasprisin information to talk to Fox News which was not correct.

It was interesting the "evident contacts" is an inference to my contacts with the media which again is not true because Tom Lyden on Fox News had admitted on camera and in the -- in an interview that he’s never spoken to me. First time I’ve ever spoken with Fox News or time Tom Lyden was February 21st, 2015 when I granted them an interview.

Q. So was Tom Lyden working on a story with a – an anonymous whistleblower?

A. No. Mr. Lyden – if – if you were to Google MSP Airport/TSA a variety of – of embarrassing news stories prior to February 19th, 2015 would pop up. Breaches of airport security and those matters. Mr. Van Leuven thought that I was giving Mr. Lyden all of this information, which was not true.²⁸⁹

After receiving his directed reassignment on February 19, Rhoades drove to Kasprisin’s home that evening, and Kasprisin called Acting TSA Administrator Mel Carraway about Rhoades’s case. Rhoades testified:

Q. So going back to the – the reassignment decision. Would the Executive Resources Council have any – have any role in the decision to your knowledge?

²⁸⁹ Rhoades Tr. at 24–26.

A. Thank you for asking that question. The night of February 19th, 2015, I drove to Ken Kasprisin's home. He called the acting Administrator Mel Carraway. I listened to their conversation. Mel said, I'm surprised they did that to Drew because I rescinded that practice on November – I believe it was November 25th, 2014. I may have sent you an e-mail document called – from Mel Carraway that rescinded that practice.

Mel said, he shouldn't have received that action because I don't recall that being processed through the ERC. Meaning, our Executive Resource Council. And I heard Mel Carraway say those – those – those words.

I called Mel Carraway about a week later on his business cell phone and spoke to him about that who confirmed my action did not go through the ERC, Executive Resource Council. So it appears Kelly Hoggan deviated from that practice and colluded between – with Bob Ball and Clifford Van Leuven to give me a directed reassignment.²⁹⁰

In a conversation between Carraway and Kasprisin, “[Carraway] indicated to [Kasprisin] that he had rescinded the generalized Directed Reassignment policy and that this type of action should not have taken place.”²⁹¹ Following his call with Carraway, Kasprisin had several discussions with Hatfield. In one of these conversations:

[Hatfield] stated he had already spoken to Kelly Hoggan regarding the Rhoades's situation and inquired if I recalled FSDs ever having the authority to directly reassign a subordinate out of their immediate commuting area. I told him that in the 10 years I had spent as an FSD, as the Acting Assistant Administrator for Aviation Operations, as the TSA Deputy Administrator and as the Acting TSA Administrator, FSDs never had that authority, that it was impractical, costly, and would result in countless legitimate grievances by those receiving such directed reassignments. Mark Hatfield parroted the same and indicated that if he had that authority as the Newark FSD, he never knew about it and he might have been tempted to use it given how many personnel challenges he faced at Newark.²⁹²

In one of the conversations between Hatfield and Kasprisin, Hatfield confirmed Rhoades was reassigned due to Van Leuven's suspicion Rhoades was a leak to the media. Kasprisin stated:

²⁹⁰ *Id.* at 36–37.

²⁹¹ Kenneth Kasprisin, Statement for the Office of Special Counsel Regarding Andrew Rhoades, (Undated). [hereinafter Kasprisin Statement].

²⁹² *Id.*

[Hatfield] continued by relaying other statements made by Hoggan: that the reason for the reassignment was that the FSD (VanLueven) didn't trust Rhoades and that he thought Rhoades was leaking information to a local reporter resulting in a series of bad news stories regarding the TSA operation at MSP; and that there were no performance or conduct issues with Rhoades. They just wanted him out of there because they didn't trust him.²⁹³

In a further conversation with Kasprisin, Hatfield "stated that Kelly Hoggan stood there in his office and lied to him regarding FSD authorities," which led Kasprisin to respond that he was aware of at least three other occasions "in which Hoggan clearly misrepresented reality." Hatfield also "assured [Kasprisin] that he would find a way to fix this mess and that he planned on a call the following day with those involved in generating Rhoades's directed reassignment (Hoggan, Ball, and VanLueven)."²⁹⁴ At the suggestion of Van Leuven and Hoggan, Hatfield offered to rescind the directed reassignment if Kasprisin agreed not to have any contact with Rhoades or the media for a year.²⁹⁵

3. Former TSA Acting Deputy Administrator Mark Hatfield Acknowledged Rhoades's Reassignment Was Inappropriate

Hatfield testified he believed Rhoades's directed reassignment was inappropriate and took actions to stop it. He also stated Hoggan's mismanagement of the situation contributed to Hatfield's decision to try to reassign Hoggan outside of OSO. Hatfield testified:

Q. We're familiar with some of his allegations. Do you know if his directed reassignment actually had to do with his reporting that wait times were falsified?

A. Had to do with what?

Q. His reporting that wait times were falsified.

A. Oh.

Q. When –

A. I never saw any – well, look, here's what happened. I stopped it immediately. I said, "Wait a minute. This is directed reassignment. Those have been frozen." "Oh, well, just frozen for FSDs." I'm like, "No, no, no, no, no."

Secondly, how can an FSD order the directed reassignment? This is my question to Hoggan's office. I don't know whether it was to

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

him or his deputy. I said, man, I've been an FSD for 10 years. I never had the authority to direct – if I had a problem player and I wanted to send them off or, you know, refresh the position. Because, you know, they were very frank, where they said, oh, he's a problem in the organization there, and so they had the authority to do this. I challenged that. I said, I never knew that that was an authority of a Federal Security Director.

Q. Did anyone ever tell you that FSDs could not directly reassign someone, or was it just kind of common knowledge?

A. It was common knowledge. I mean, after 10 years of being an FSD, I never knew of anyone who did it, I never was offered that as an authority and never saw it written anywhere. So it was the best-kept secret in TSA, if that actually existed, but I have no belief that it existed.

Q. So, to your understanding, the reassignment did not comport with TSA policy. Is that correct?

A. I did not believe that it did.

And let me go back to what I said earlier. You know, a directed reassignment is a tool. And so they tried to come back and say, "Oh, no, it's happened," you know, and gave me examples. And I said, wait a minute. You were eliminating that position or downsizing something here, and so it was done in a different context. As an involuntary move, it was unprecedented, to my belief.²⁹⁶

Hatfield further stated Hoggan supported Rhoades's reassignment and defended it even after Hatfield questioned them about its propriety. He testified:

Q. You said they came back and told you this. Who is "they"?

A. Either Kelly or his deputy. Those are the two people I talked to about it.

Q. Okay. So Kelly Hoggan was supportive of this directed reassignment?

A. Yes. He was supportive of it, and he tried to justify it to me and tried to tell me that there was precedent for it, which I challenged him on.

²⁹⁶ Hatfield Tr. at 160.

Q. Did this play into your decision to try to directly reassign Mr. Hoggan?

A. The mismanagement aspect of it, yes.

Q. Mismanagement of Mr. Rhoades's situation?

A. Yes, and his representation to me that it was an FSD's authority to do this. And I could find no evidence that that had ever been the case, either through my research with HR in Washington or in my 10 years as an FSD in the field.²⁹⁷

Hatfield stated the Office of Chief Counsel was "intimately aware" of Rhoades's case, ultimately supporting his decision to stop the directed reassignment. He testified:

Q. Did you ever talk with Counsel about –

A. Of course. Throughout this. Counsel was intimately aware of this case.

Q. And what did Counsel say about the ability of an FSD to directly reassign a subordinate?

A. I don't remember exactly, but I'm quite sure that -- well, nobody ever came and said, oh, yeah, here's the authority, it's written right here. So –

Q. Did the Office of the Chief Counsel ever try to stop you?

A. No.

Q. Okay.

A. Absolutely not. In fact, supported it, supported my stopping of the directed reassignment.

Q. Do you know why they supported it? Was it because the movement didn't comport with policy, or because they saw it as retaliatory and wanted to head off a lawsuit, or something else?

A. You would have to ask them on that.

Q. Okay.²⁹⁸

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 160–61.

Hatfield also confirmed he had several conversations with Kasprisin about Rhoades's case but did not seem to have a detailed recollection of these discussions.²⁹⁹

4. *TSA Rescinded Rhoades's Directed Reassignment After He Filed a Complaint with the Office of Special Counsel*

Rhoades believed the directed reassignment was retaliatory, so he retained a counsel and filed complaints with the Office of Special Counsel (OSC) and Merit Systems Protection Board (MSPB). These actions extended the clock for Rhoades to respond to the agency. He testified:

Q. So it's – going back to the notice that you were handed. It said, "Please accept or decline this directed reassignment within ten calendar days of receiving this notice." What was your reaction?

A. I did not respond to it because what had happened was, when the agency found out that I submitted an – an OSC complaint and an MSPB complaint, they shifted gears, if you will. And – and – what normally happens is, if you don't accept in ten days they start separation. They – I'm sure you've heard from Sharlene Mata. I'm sure you've heard from Heather Callahan, but they move to separate you from service. But because I submitted an OSC complaint to MSPB, they started to say, well, we want you to rescind those two actions. And that's when they sent me a settlement agreement.

I – I sought legal counsel from Lynne Bernabei, who's a lawyer here in Washington, D.C., and they said, we'll give you 21 days because you're seeking legal advice. And so that initial ten days was extended. And then they were trying to – when I say "they," excuse me, the TSA headquarters was attempting to submit a settlement agreement to remove the action and rescind my OSC and MSPB complaints and that's when I said, I – I decline. I'm not going to move forward with the settlement agreement. I'm not going to sign a nondisclosure agreement. I'm not going to accept this action.³⁰⁰

After filing complaints with the MSPB and OSC, Rhoades was contacted by TSA's Office of Chief Counsel with a settlement offer, which rescinded his directed reassignment. Rhoades declined the offer, because it would require him to drop his claims against TSA and restrict him from speaking about his experiences. He testified:

Q. "Negotiate a settlement agreement," can you – can you go into a little more detail?

A. I can. On February 19th I was issued a directed reassignment. I contacted Merit Systems Protection Board, as well as the Office of

²⁹⁹ *Id.* at 161–63.

³⁰⁰ Rhoades Tr. at 35–36.

Special Counsel. During – while that process ensued, the TSA headquarters found out, because what you have to do is you have to serve your TSA headquarters through MSPB, that I had launched a complaint with the Office of Special Counsel and MSPB. I was immediately contacted by Mr. Steven Colon, who is the chief of the litigations branch, who sent me a written settlement agreement. I declined it.

- Q. On what – on what basis did you decline it?
- A. I could provide a copy of it for you, and I would like to provide a copy of it to you, but I read it. And it, basically, said I could not pursue any administrative actions against anyone at the TSA. It said I could not speak about my experiences. And it said that I could – I had to withdraw my complaints to the MSPB and the Office of Special Counsel. And the only thing they would do is rescind my directed reassignment. So it prohibited me in the future from being able to do what I'm, candidly, doing today and I thought that was a big risk.³⁰¹

Former Assistant Chief Counsel for Administrative Litigation, Steven Colon, also testified that the decision to rescind the reassignment was, at least partially, made in response to Rhoades filing MSPB and OSC complaints. Colon stated:

- Q. You indicated that the directed reassignment of Drew Rhoades was outside the batch of reassignments that was made? Do you know why Drew Rhoades was reassigned or had been given a directed reassignment?
- A. It is my understanding that he was having difficulty getting along with his Federal security director, you know. And that is – the rationale for it was essentially that the Federal security director was having issues with him in that he wasn't taking direction or was challenging everything he had said to him, or saying, you know, that's not how the old boss did it, and consistently did things like that.

So there was a conflict between the two of them. And my understanding is the Federal security director went up to his regional director, Bob Ball, and they went through the Office of Security Operations. Unclear as to who they went through ultimately. But they made the decision that they had a vacant billet in Florida, and so they made the decision to do that directed reassignment.

³⁰¹ *Id.* at 14–15.

Q. And on what information do you base this understanding? And where did you obtain this information?

A. Because I'd had conversations with the Federal security director, because at the time that the – at the time that the directed reassignment went into effect – the time the directed reassignment was ordered – Mr. Rhoades filed an MSPB appeal.

So the MSPB appeal came in to me, and I looked at it, and I then, you know, I thought it was strange because, you know, we hadn't actually seen many – most of the – we hadn't seen any MSPB appeals on directed reassignments.

And I actually wasn't certain, you know, whether this had been as part of the group or whether was this outside the group. It seemed untimely because it came earlier, like the spring. Usually it was, like, April when you'd get all the OSO directed reassignments done.

So I did some – so, ultimately – and then I found, I think the same day we got that, I also found out he had gone to OSC. So there was a question of whether we could resolve it or not.

And so I went to Ms. Kerner, and I think Ms. Kerner went to Mr. Hatfield, and there was discussions with Ms. Kerner and Mr. Hatfield as to what to do with about this case.

And ultimately we tried to revolve it by, you know, just pulling it entirely, and that got rid of the MSPB case, but pulling it, saying, you know, we're just pulling the directed reassignment.

We tried to resolve it that way, and the MSPB case went away. But I know we still were defending the OSC complaint.³⁰²

In March 2015, OSC took the rare step of requesting TSA issue a stay of Rhoades's directed reassignment, which TSA granted.³⁰³ On April 1, 2015, Van Leuven formally rescinded Rhoades's directed reassignment, citing Rhoades's response "detailing the hardship that would be caused by a reassignment to Tampa" specifically noting "child custody issues for both you and your spouse would create various legal and financial obstacles to moving, as well as, the threat of a possible loss of custody."³⁰⁴ Given this hardship, Van Leuven said he "decided it

³⁰² Colon Tr. at 52–54.

³⁰³ Press Release, Office of Special Counsel, OSC Obtains Relief for TSA Whistleblowers Who Disclosed Security Risks (Apr. 29, 2015), <https://osc.gov/News/pr15-10.pdf>.

³⁰⁴ Memorandum from Clifford Van Leuven, Fed. Sec. Dir., Transp. Sec. Admin. to Andrew Rhoades, Ass't Fed. Sec. Dir., Transp. Sec. Admin, *Rescission of Directed Reassignment* (Apr. 1, 2015).

would not be in the best interests of you, or the Agency, to reassign you to Tampa, FL” and “you will not be directly reassigned.”³⁰⁵

Rhoades disputed Van Leuven was initially unaware of these circumstances. He testified:

[I]t was common knowledge that I was going through a divorce and a custody battle. And Mr. Van Leuven allegedly said he didn't recall that, but that's not true. He knew exactly what my family situation was. And I would argue that they did that purposely to try to get me to resign 'cause they knew I could not leave the State of Minnesota or else I would lose custody of my children.³⁰⁶

³⁰⁵ Memorandum from Clifford Van Leuven, Fed. Sec. Dir., Transp. Sec. Admin. to Andrew Rhoades, Ass't Fed. Sec. Dir., Transp. Sec. Admin., *Rescission of Directed Reassignment* (Apr. 1, 2015).

³⁰⁶ Rhoades Tr. at 40.



DATE: April 1, 2015

TO: Andrew Rhoades
Assistant Federal Security Director – Mission Support
Minneapolis-St. Paul International Airport

FROM: Clifford C. Van Leuven
Federal Security Director
Minneapolis-St. Paul International Airport

RE: Rescission of Directed Reassignment

On February 19, 2015, you were issued a memorandum directing your reassignment from your current position to Assistant Federal Security Director – Mission Support at the Tampa International Airport, Tampa, FL. For the reasons discussed below, I am rescinding and cancelling your directed reassignment.

After you were issued the February 19, 2015, notice of directed reassignment, you provided me a response via email on February 22, 2015 detailing the hardship that would be caused by a reassignment to Tampa. You specifically indicated that child custody issues for both you and your spouse would create various legal and financial obstacles to moving, as well as, the threat of a possible loss of custody. As I shared with you in a subsequent meeting in my office with DFSD McMahon, given the information provided in your response, and the hardship a reassignment would cause you and your family, I decided it would not be in the best interests of you, or the Agency, to reassign you to Tampa, FL.

Therefore, I am cancelling and rescinding the notice you received on February 19, 2015, and you will not be directly reassigned.

Please feel free to contact me with any questions.

Please sign and date below indicating receipt of the letter.


Andrew Rhoades

4/1/2015

Date

OSC issued a press release on April 29, 2015 announcing it had blocked Rhoades's personnel action as well as the suspension of another MSP TSA official. OSC wrote:

Andrew Rhoades, an assistant federal security director, reported violations of aviation security policy. Specifically, he objected to a supervisor's proposal to have TSA screeners improperly handle confiscated weapons. Additionally, he reported that stickers were not consistently placed on checked bags that had been cleared by TSA. Both issues were remedied by TSA. Beginning in September 2014, a series of local news stories ran on security lapses at the Minneapolis-St. Paul International Airport. In December 2014, one of Mr. Rhoades's supervisors sought to learn if one of his employees was providing information to the media. In February 2015, that same supervisor issued Mr. Rhoades a forced reassignment to an airport in Florida. In March 2015, the TSA granted OSC's request for a stay. Subsequently, TSA formally rescinded its reassignment of Mr. Rhoades.³⁰⁷



U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

OSC Obtains Relief for TSA Whistleblowers Who Disclosed Security Risks

FOR IMMEDIATE RELEASE **CONTACT: Nick Schwellenbach, (202) 254-3631; nschwellenbach@osc.gov**

WASHINGTON, D.C./April 29, 2015 –

The U.S. Office of Special Counsel (OSC) blocked proposed personnel actions involving two Transportation Security Administration (TSA) employees at the Minneapolis-St. Paul International Airport who reported security risks.

Andrew Rhoades, an assistant federal security director, reported violations of aviation security policy. Specifically, he objected to a supervisor's proposal to have TSA screeners improperly handle confiscated weapons. Additionally, he reported that stickers were not consistently placed on checked bags that had been cleared by TSA. Both issues were remedied by TSA. Beginning in September 2014, a series of local news stories ran on security lapses at the Minneapolis-St. Paul International Airport. In December 2014, one of Mr. Rhoades' supervisors sought to learn if one of his employees was providing information to the media. In February 2015, that same supervisor issued Mr. Rhoades a forced reassignment to an airport in Florida. In March 2015, the TSA granted OSC's request for a stay. Subsequently, TSA formally rescinded its reassignment of Mr. Rhoades.

While Rhoades's directed reassignment was rescinded, his whistleblower retaliation complaint with OSC remains open. TSA Chief Counsel Francine Kerner acknowledged it was an "open question" whether Rhoades had been reassigned as a result of a protected disclosure.³⁰⁸ She stated:

Q. Have any of the directed reassignments been retaliatory for a protected disclosure?

³⁰⁷ Press Release, Office of Special Counsel, OSC Obtains Relief for TSA Whistleblowers Who Disclosed Security Risks (Apr. 29, 2015), <https://osc.gov/News/pr15-10.pdf>.

³⁰⁸ Kerner Tr. at 44.

A. I'm not aware of any that were made for protected disclosure. I know the Office of Special Counsel is still looking at the Drew Rhoades case, and so that's still an open question.³⁰⁹

Colon agreed the Rhoades case "could end up being a very large problem" and could potentially lead to a whistleblower reprisal finding.³¹⁰ He testified:

Q. Did anyone in OCC ever raise concerns that the Rhoades directed reassignment was a potential violation of whistleblower rules?

A. Before it happened?

Q. Yes.

A. I don't know.

Q. After it happened?

A. And so after it happened, once he filed the MSPB case, and reading – you know, and he had gone to OSC at that point, you know, I looked at it from the point of view of the timing and, you know, what he had to say and, you know, whether, you know, he alleges that he's accused of leaking stuff to the media, which, you know, having worked on the MacLean issue, I'm well aware that that could end up being a very large problem, you know. It could, you know.

Whether they're going to find whistleblower reprisal or not is still up in the air. But, you know, once it went to the MSPB and, you know, I was involved and Ms. Kerner was involved, you know, obviously there is – you know, they know that there's now a risk.

I don't know if they sought out any legal advice before they did it in the first place which would have stopped the MSPB case from happening and the OSC complaint from happening. I just don't know.³¹¹

Former TSA Administrator Peter Neffenger said TSA was "supporting Mr. Rhoades in his complaint, which stands before the Office of Special Counsel."³¹² He deferred to OSC's investigation, but acknowledged it would have been inappropriate if Rhoades was removed due to suspicions he was leaking to the media. He testified:³¹³

³⁰⁹ *Id.*

³¹⁰ Colon Tr. at 120.

³¹¹ *Id.*

³¹² *TSA Hearing Part II* at 59.

³¹³ *Id.*

Mr. Gosar. Now, Andrew Rhoades was issued a directed reassignment in February of 2015, which was stayed by the Office of Special Counsel due to concerns of retaliation for protected whistleblower activity and ultimately rescinded by the TSA. Can you explain how Mr. Rhoades's reassignment was approved?

Mr. Neffenger. Again, I would defer to the person who made that decision. I don't allow the policy under my watch, and we're supporting Mr. Rhoades in his complaint, which stands before the Office of Special Counsel right now.

Mr. Gosar. Now, part of the justification for Mr. Rhoades's reassignment was to sever past loyalties due to suspicions he was a source for the media, which he denies. Do you consider this an appropriate justification?

Mr. Neffenger. Well, again, that matter is being investigated right now by the Office of Special Counsel. If they find that to be true, then of course it wasn't appropriate.³¹⁴

Neffenger declined to recognize Rhoades's directed reassignment was inappropriate in advance of OSC's conclusions. While OSC has yet to conclude the case, there is substantial evidence the reassignment was whistleblower retaliation. This would not be the first time for TSA. In May 2018, TSA reached a \$1 million settlement with OSC to remedy the improper directed reassignment of three TSA officials originally based in Hawaii.

E. TSA Relocates the Honolulu International Airport DFSDs

In January 2014 Sharlene Mata, Heather Callahan Chuck, and Frank Abreu were reassigned from their previous positions to serve as DFSDs at Honolulu International Airport as part of TSA's realignment in Hawaii and the Pacific. This realignment reclassified what had previously been FSD positions—serving different parts of Hawaii and the Pacific—into DFSDs with portfolios including authority over different parts of the area.³¹⁵

Mata had previously served as Lihue Airport's FSD on the Hawaiian island of Kauai for eight years. Mata stated during this time she consistently received performance ratings of Exceeded Expectations or Achieved Excellence, the highest two ratings.³¹⁶ She also was detailed to serve in positions of higher responsibility including Deputy Director of Field Operations and Regional Director. As part of the realignment, Mata was reassigned to serve as DFSD of Honolulu International Airport. The role was a demotion in title but increased her responsibility, because she became responsible for transportation security on Hawaii's neighbor islands.³¹⁷

³¹⁴ *Id.*

³¹⁵ Mata O.S.C. Disclosure at 1.

³¹⁶ *Id.*

³¹⁷ Mata O.S.C. Disclosure at 1.

Chuck was TSA's Diplomatic Liaison for the Asia Pacific region when she was reassigned to serve as a DFSD at Honolulu International Airport. She previously had served as TSA's Director of Field Operations in OSO.³¹⁸ As a DFSD, Chuck's role was responsible for managing operations at Honolulu International Airport.³¹⁹

Abreu was responsible for Guam and other Pacific islands under the airport's jurisdiction.³²⁰

1. *The DFSDs Identified Significant Operational Deficiencies at Honolulu International Airport*

The new DFSDs identified numerous significant deficiencies in operations at Honolulu International Airport. Chuck e-mailed the FSD, Stanford Miyamoto, on February 26, March 4, and March 11, 2014 to notify him of these issues, which included: (1) problems with maintaining tracking certifications; (2) failures in implementing standard operating procedures; (3) poor coordination between the training and screening functions;³²¹ (4) failure to engage in tactical response plan exercises; (5) excessively high spending plans; (6) management control deficiencies; (7) noncompliance with regulations for access controls and asset control;³²² (8) failure to accurately record airport wait times; (9) a lack of accountability within the inspections function; (10) improper use of cell phones in a classified environment; (11) and failing to provide the airport's leadership team and cleared staff with intelligence briefings for several years.³²³

Mata stated Miyamoto was unsupportive of the DFSDs' efforts to address these security issues. She identified similar deficiencies in airports in Maui and the island of Hawaii and raised them in meetings but did not submit them in writing.³²⁴ Mata stated:

I and DFSD Callahan [Chuck] began to correct these operational and administrative shortcomings.... [h]owever, we were ousted from our positions while primarily still in discovery mode and prior to having any meaningful opportunity to do so. FSD Miyamoto's failure to support us in correcting these reported deficiencies and security vulnerabilities resulted in an immense cost to the taxpayer, that could have easily been avoided if

³¹⁸ Briefing by Heather Callahan Chuck to H. Comm. On Oversight & Gov't Reform Staff on directed reassignments. (Feb. 9, 2016).

³¹⁹ Letter from Heather Callahan, Dep. FSD Pac., HNL, Office of Sec. Operations, to Equal Employment Opportunity, *Complaint of Discrimination based on Gender, and Harassment and Retaliation by FSD Pacific, Stanford Miyamoto* (Apr. 4, 2014). [hereinafter Callahan EEO Complaint].

³²⁰ Memorandum from Frank M. Abreu, Dep. FSD, Heather Callahan, Dep. FSD to Stanford Miyamoto, Fed. Sec. Dir., Pac., Office of Sec. Operations, *Proposed Pacific Realignment Staffing Model* (Feb. 14, 2014) (on file with the Committee).

³²¹ Email from Heather Callahan, Dep. Fed. Sec. Dir. Pac., HNL, to Stanford Miyamoto, Fed. Sec. Dir. Pac. Regions, T.S.A. (Feb. 26, 2014, 7:55 PM) (on file with the Committee).

³²² Email from Heather Callahan, Dep. Fed. Sec. Dir. Pac., HNL, to Stanford Miyamoto, Fed. Sec. Dir. Pac. Regions, T.S.A. (Mar. 4, 2014, 8:26 AM) (on file with the Committee).

³²³ *Id.*

³²⁴ Mata O.S.C. Disclosure at 4.

both proper management had been effected at the airports in the Pacific, and had myself and DFSD Callahan had the opportunity to correct such.³²⁵

The DFSDs requested TSA’s OOI conduct an inspection. OOI conducted its investigation in August 2014—after they had already been reassigned—and identified 96 Corrective Action Plans,³²⁶ which Mata called a “record number.”³²⁷

Mata and Chuck had strained relations with Miyamoto and both filed EEO complaints with TSA’s Civil Rights Office prior to their reassignment. Mata stated:

Immediately after assuming this new position my Supervisor, Pacific FSD Stanford Miyamoto began discriminatory and ultimately retaliatory actions against me. Soon thereafter FSD Miyamoto successfully and without merit, engaged the support of OSO senior leadership in effecting additional unwarranted reprisal actions against me.³²⁸

Chuck stated “[t]he FSD Pacific, Stanford Miyamoto, my direct supervisor has on an ongoing basis discriminated against me based on my gender. The FSD Pacific has, and continues to, harass and retaliate against me.” She cited examples excluding Chuck from participating in her assigned duties, undermining her authority, and sharing derogatory information about her to her staff.³²⁹

Following their reassignments, Mata, Chuck, and Abreu were tasked with developing a realignment plan to achieve greater cost efficiencies in the Pacific area. On February 14, 2014, they presented a proposed plan to reduce staffing by 34% and costs by 32%. Mata stated Miyamoto was initially impressed with their plan and approved it. But a couple of weeks later on February 28, Miyamoto tasked the Honolulu AFSDs with developing a new realignment plan and excluded Mata and Chuck from its development.

2. Deputy Assistant Administrator Joseph Salvator and Other TSA Senior Leaders Reassigned the DFSDs Out of Hawaii

Deputy Assistant Administrator of OSO Joseph Salvator criticized the revised plan and harshly reprimanded Mata and Chuck’s work and conduct during an April 8, 2014 video teleconference. Mata and Chuck believed these criticisms were unfair. A number of problems Salvator raised came from the plan developed after the DFSDs were removed from the project.

On Thursday, April 17—less than four months into their tenure as DFSDs—Mata, Chuck, and Abreu were issued directed reassignments outside of the state of Hawaii. Mata was

³²⁵ *Id.*

³²⁶ Memorandum from Joseph Salvator, Ass’t Adm’r, Office of Inspection to Kelly Hoggan, Ass’t Adm’r, Office of Sec. Operations, *Federal Security Director’s Office Inspection Honolulu International Airport (HNL), Honolulu, HI: R140027* (Oct. 6, 2014).

³²⁷ Mata O.S.C. Disclosure at 4.

³²⁸ *Id.* at 1.

³²⁹ Callahan EEO Complaint.

reassigned to Seattle, WA, Chuck to Los Angeles, CA, and Abreu to Burbank, CA.³³⁰ In a highly unusual step, these directed reassignments were simultaneously accompanied by temporary internal assignment-details. Mata was expected to report to her new position on Monday, April 21, four days later and the day after Easter Sunday.³³¹ Mata reported she was subjected to further retaliation after relocating to Seattle, including being passed over for a DFSD position. Mata stated Regional Director Mike Irwin asked Seattle FSD Jeff Holmgren who he recommended for the vacant DFSD position, and when Holmgren recommended Mata and Irwin allegedly responded, “[n]ot unless you want to be the FSD of Moline,” which is in Illinois.³³²

Salvator testified he and other TSA senior leaders, including Hoggan and Pistole, decided to remove the DFSDs because they believed the leadership team in Hawaii was broken beyond repair and required changes. They believed it would be more appropriate to remove the DFSDs because Salvator and the other leaders believed the DFSDs were behaving unprofessionally and undermining Miyamoto. He stated:

- Q. What happened to Ms. Callahan? Was she direct reassigned?
- A. Yes.
- Q. Why was she direct reassigned?
- A. So there was this national effort going on. Most of the country had executed to it. Hawaii was one of the last. They were having problems. In April of 2014 –
- Q. What problems were they having?
- A. So in April of 2014, the administrator started getting phone calls from the workforce, the administrator started getting e-mails from the workforce, Mr. Hoggan was getting phone calls from the Hawaii workforce with grave concern over what was going on in Hawaii.
- Q. And what – and my time is short, but I want to get as much as I can. What was going on in Hawaii, allegedly?
- A. So they needed to consolidate, for the first time ever, the position for Guam and Saipan, the deputy for Honolulu, and now what used to be FSD Maui became a deputy. And now they all work for the FSD in Honolulu for the first time.

To make this happen, there was business rules -- there was business rules associated with this that needed to be followed. The FSD

³³⁰ Press Release, Office of Special Counsel, OSC Obtains Settlements for TSA Whistleblowers in Three Involuntary Reassignment Cases (May 23, 2018), <https://osc.gov/News/pr-18-30%202.pdf>.

³³¹ Mata O.S.C. Disclosure at 9.

³³² *Id.* at 23.

assigned the project to the three deputies, the now three deputies to work the plan. The plan never got submitted correctly to headquarters. The plan started making it out to the workforce. The plan put together by the three of them was, in my opinion, poor. It reduced the FSD staff by 34 percent, which was almost half, which was not the intent of this activity. And when the employees found out almost half of the FTE for Hawaii was going to be reduced, they started, rightfully so, speaking out.

Additionally, one Saturday morning Ms. Mata bumped into the Governor of Hawaii on a Saturday and spoke to him -- I believe spoke to him about the plan, all of this before the plan had been approved. The plan had not been properly followed. When we learned this, my supervisor, Mr. Hoggan, asked me to get everybody together and get them on the same page.

I attempted to do that. I chaired a videoconference with the leadership in Hawaii. I had several people in the room with me on the VTC. The VTC was meant to get them on the same page, but during the VTC, I felt Ms. Callahan, Ms. Mata, to some extent Mr. Abreu, I felt they were unprofessional. I felt that they were undermining the FSD. They clearly were not leading this effort.³³³

Salvator stated other senior TSA officials including Pistole, Halinski, and Hoggan were involved in the decision to reassign the three Honolulu DFSDs. He testified:

- Q. Did this conference – this teleconference occur before or after the inspection of Hawaii had been conducted?
- A. Before. I thought it was going to be a simple, hey – a little bit of a counseling, but when I got done, it was my belief, and there was four or five other people in the room with me, that the leadership team in Hawaii was broken, dysfunctional, and was not willing to make it happen, and the workforce was suffering.

This was, like, 2:00 on a – it was April 8th, I remember that. So I conducted it from 2:00 to 3:00. At 3:00 that day, me and Mr. Hoggan went up and we had a meeting with Mr. Halinski and Mr. Pistole. Mr. Hoggan ask that I provide them an overview of the VTC, which I did. A discussion ensued about we need to make a change. The discussion was –

- Q. Who indicated that a change needed to be made?

³³³ Salvator Tr. at 291–93.

A. I don't recall. There was, I think – again, Mr. Pistole was in the room, Mr. Halinski, Mr. Hoggan, Ms. – I gave them –

Q. Who else was in the room?

A. Mr. Pistole, Mr. Halinski, Mr. Hoggan, myself, maybe Kim Hutchinson, I think, Mr. Pistole's senior advisor. I gave an overview of the VTC. The discussion ensued amongst the group -- I don't feel like I was leading it -- that you could remove the FSD for failing to lead, or you could remove the three deputies for being not cooperative in the process, to me, clearly undermining the FSD, trying to make him look bad.

The decision was made -- Mr. Pistole was in the room -- to remove the three. It certainly –

Q. On what date did that occur?

A. To the best of my knowledge, it was April 8th around 3:00.

It would not have been my authority to remove three deputy FSDs from one airport, from one location. That would certainly be something that the administrator would be involved in.

The Deputy Administrator Halinski said –

Agency Counsel. I'm going to object to the extent that any of this is going to call for deliberative process. So to the extent that your answer calls for the manner in which the decision was made, I would object to that and instruct you not to answer, other than the final decision to remove the three DFSDs.

A. The deputy administrator said, okay, consult with Human Capital, Civil Rights Civil Liberties, OCC, and others. The following day we brought a group together, the senior leaders from those organizations, discussed how this would be done, what were the potential repercussions. And it was soon thereafter executed. All three, Frank Abreu, Heather Callahan, and Shar Mata were reassigned out of Honolulu.

Q. When you say soon thereafter, approximately how long after April 8th?

A. I don't recall, but it wasn't long, exactly.³³⁴

³³⁴ *Id.* at 291–96.

3. TSA's Assistant Chief Counsel for Administrative Litigation Acknowledged TSA May Have Violated the Whistleblower Protection Act

Former TSA Assistant Chief Counsel for Administrative Litigation Steven Colon stated he had warned Salvator the reassignments could be viewed as retaliatory in nature and would likely prompt a lawsuit. He testified:

A. And then there was the issue with Ms. Mata and two other employees in the Office of Security Operations regarding their transfer out based on the conflict with their FSD, Mr. Miyamoto.

Q. And speaking of her work with Mr. Miyamoto, did you have any involvement in her transfer out of Hawaii, as you described it?

A. I provided some legal advice to Mr. Hoggan and to Mr. Salvator. I had a meeting with Mr. Salvator in which he relayed to me the information about how a phone call he had with the three employees and Mr. Miyamoto went and that, you know, the employees were combative against Mr. Miyamoto. The employees were defiant, I think is how he described it. And ultimately he felt that the employment relationship was broken.

And so, you know, he asked me from a legal standpoint what could possibly happen, and I said, Well, you will likely get sued at least –

Q. What could possibly happen?

A. Happen if we move them. I'm sorry. So if we were to move the three employees out, you know, directly reassign them based on their inability to work with their boss, what would be the outcome. You know, what would you think would happen?

And I said, "You probably will get sued on multiple fronts. So if you're going to do this, you need to – you know, if you're going to do this, please make certain that you have all of your ducks in a row, and you're going to have to stick by this decision." So I was right.

Q. What ducks would have to be aligned?

A. Everything that you're doing. That you have enough evidence to establish that the employment relationship is broken, that it would be in the best interest of the agency to promote the efficiency of the service to directly reassign them out, that you would need to basically be able to meet the standard of, you know, for directed reassignments which is, essentially, that you're not doing this for my prohibited reason, you know.

I had no reason to believe at that time that anything that happened in all of this, you know, was based on any retaliatory, you know, reason, but I did warn him that it's likely going to be raised.³³⁵

Colon further acknowledged he was unsure whether any of Miyamoto's actions toward the DFSDs were retaliatory. He testified:

Q. Do you have any reason now to believe that it was based on any retaliatory intent?

A. Well, just generally speaking, that the investigation has gone on for a very long period of time. They also have filed EEO complaints, which Ms. Mata's case and the other two are all pending and under my – those are under my jurisdiction, not the OSC matter. And that, you know, I came to learn at some point thereafter that there was an allegation that Ms. – I think it was Ms. Mata had been disclosing information regarding Mr. Miyamoto's management style and I believe some of the – some metric numbers, you know, that she had been, you know, calling those into question, which then, of course, obviously triggers whistleblower reprisal, which –

Q. How did she call them into question?

A. I believe she reported to headquarters, someone in headquarters staff, that – I think it had to do with some realignment of some sort, of the realignment of the airport function, and how I think there was going to be a net loss of employees.

And Mr. Miyamoto had directed her and the other staff not to send things to headquarters and that it had to be run through Honolulu, which was through him. And ultimately they had been communicating directly with headquarters and not running those numbers through him. So that at least raises the specter of a whistleblower case, so –

Q. Do you believe that this action that Mr. Miyamoto took in any way violated the Whistleblower Protection Act?

A. I don't know yet. I don't know. I don't have enough information to know that.³³⁶

Mata, Chuck, and Abreu all filed whistleblower retaliation complaints with OSC. While Mata and Abreu remained with TSA despite the reassignment, Chuck received additional

³³⁵ Colon Tr. at 150–52.

³³⁶ *Id.* at 150–153.

reassignments, eventually prompting her to resign. In May 2018, four years after the initial reassignments, OSC announced it had reached a settlement agreement with TSA, including \$1 million in compensatory damages for the three individuals combined and returning Mata and Abreu to comparable positions in Hawaii.³³⁷ Special Counsel Henry Kerner stated he was “pleased that we were able to achieve favorable results for the three TSA employees who had their lives thrown into disarray and hope this outcome will encourage others to speak up when they see something that could put the public at risk.”³³⁸

F. TSA Inappropriately Employed Directed Reassignments

As the above examples illustrate, senior TSA officials issued directed reassignments in a manner inconsistent with the agency’s policies and as a means of retaliation. Further, the leadership succession planning initiative—which promised to take into account employees’ preferences and potential hardships—issued reassignments serving no organizational purpose and denied requests for consideration based on significant hardships. As a result, a number of experienced and high-performing employees left the agency.

1. TSA Improperly Used Directed Reassignments Against Other TSA Employees

While the cases of Brainard, Rhoades, and the Hawaii DFSDs illustrate the problems with the use of directed reassignments at TSA, other examples exist as well. Former Jacksonville FSD Ed Goodwin, was reassigned to replace Brainard in Des Moines under questionable circumstances. Goodwin was directly reassigned, against his wishes, and replaced as FSD by a TSA official with little if any field experience.³³⁹ TSA ignored how the move would cause Goodwin significant hardship. Rhoades testified:

[Goodwin] was the primary care giver for his elderly parents – 89 and 95 years of age. One of his parents was diagnosed with Alzheimer’s disease. His only daughter was a senior in high school and he was upside down on his mortgage around the time he was issued his reassignment. There wasn’t a viable option that he could leave Florida.³⁴⁰

Goodwin believed TSA was improperly trying to force him and other older FSDs out and filed an EEO Complaint against the agency.³⁴¹ He received a default order on liability in the case after TSA failed to respond to his case in a timely manner.³⁴²

³³⁷ Press Release, Office of Special Counsel, OSC Obtains Settlements for TSA Whistleblowers in Three Involuntary Reassignment Cases (May 23, 2018), <https://osc.gov/News/pr-18-30%202.pdf>.

³³⁸ *Id.*

³³⁹ Formal Complaint of Edward J. Goodwin, Goodwin v. Johnson, EEOC Decision No. 510-2015-00209X (Jun. 30, 2015).

³⁴⁰ *TSA Hearing Part I – Rhoades Statement.*

³⁴¹ Formal Complaint of Edward J. Goodwin, Goodwin v. Johnson, EEOC Decision No. 510-2015-00209X (Jun. 30, 2015).

³⁴² Order on Complainant’s Motion for Sanctions, Goodwin v. Johnson, EEOC Decision No. 510-2015-00209X (Jun. 30, 2015).

Hatfield also cited Goodwin as an example of someone who was reassigned for being out of Hoggan's favor. He testified:

Q. Any other people you can mention who were out of Mr. Hoggan's favor and therefore moved?

A. The gentleman from Jacksonville, Florida, a Federal Security Director.

Q. And why was he out of Mr. Hoggan's favor?

A. Again, I don't know their personal history, but that, again, was -- again, you know, as I said, you would see these people, the flags go up, and suddenly somebody would get a reassignment. And it would be, like, well, is it because they'd been there a certain number of years? There was nothing documented. There was nothing that says your tour of duty -- and I don't know if this has even been addressed today. There was nothing that said you get assigned to Chicago, Illinois, and your term is 5 years and you can re-up it for three additional 1-year terms, something like that, things the way they do it at the State Department for foreign or the way TSA's international does it for their TSARs, the T-S-A-Rs, international representatives. It was a very veiled, unknown system of term limits and term lengths.

And, I mean, you had people, and often it was, well, you've been there too long, we've got to refresh, we need to refresh that airport and refresh you. So those were sometimes kind of the justifications.³⁴³

Former Los Angeles Airport FSD Mark Haught also received multiple retaliatory directed reassignments. In 2011, Haught was directly reassigned from Arlington, VA to Charlotte, NC at a cost of \$197,000—which also led to a loss of over \$400,000 on his home.³⁴⁴ In May 2014 Haught was reassigned again to Los Angeles. According to Rhoades, within 30 days of Haught's move to Los Angeles, Haught's wife, who was also a TSA employee, was reassigned from Los Angeles, CA to Washington, DC.³⁴⁵ In an EEO complaint filed in response to his initial reassignment, Haught stated:

TSA senior leadership is engaging in discriminatory activities that I believe to be in violation of federal law and regulation by issuing directed reassignments primarily to older male TSES employees who are in their 50's and 60's, most of whom are nearing or eligible for retirement.³⁴⁶

³⁴³ Hatfield Tr. at 138-139.

³⁴⁴ Mark Haught, Statement for EEO Complaint, (Undated) at 5–6. [hereinafter Haught Statement].

³⁴⁵ *TSA Hearing Part I – Rhoades Statement*.

³⁴⁶ Haught Statement.

Haught further stated he had been “unlawfully discriminated against and have been the subject of retaliation from Gale Rossides, Chris McLaughlin and Scott Johnson” and was “punitively reassigned from an Area Director position and downgraded to the FSD position in Charlotte” while younger and less experienced employees received more favorable treatment.³⁴⁷

2. Senior TSA Officials Reportedly Wanted to Use Directed Reassignments to Coerce Disfavored Employees to Leave TSA

In his EEO complaint, Haught stated he heard senior TSA officials discuss directed reassignments as a means of coercing employees to leave the agency.³⁴⁸ He said former Acting Deputy General Manager for Field Operations Scott Johnson asked when some older employees were going to retire, identifying several by name.³⁴⁹ According to Haught, “[Johnson] went on to say, ‘I know how to get rid of them – if I give them a directed reassignment they’ll retire and move on.’”³⁵⁰

Another account suggests Hoggan adopted a similar mentality. A TSA employee named Arthur Drenth provided OSC a statement in which he said he frequently carpooled with Hoggan. Drenth stated that in approximately 2010:

Mr. Hoggan mentioned he planned to reassign an OGS employee who lived in Annapolis. I don’t recall a name but the plan was to force the person to start reporting to TSOC in Herndon vs. where they had been reporting which was TSA HQ. Mr. Hoggan stated that the “commute will be so much worse they will quit or leave.”³⁵¹

On another occasion approximately in 2012, Drenth stated Hogan said, “he would ‘take out anyone perceived as a threat because my family has gotten used to THIS lifestyle.’ He clarified that he meant his salary.”³⁵²

Hatfield testified he observed Hoggan using directed reassignments in a retaliatory manner and lost confidence in his leadership, leading Hatfield to attempt to reassign Hoggan out of OSO. Hatfield stated, “[y]ou know, I think that [Hoggan] had run a very dictatorial department. He was using the directed reassignment process to manipulate positions in the field and to both help people that were in favor and to punish people that were out of favor, in my assessment.”³⁵³ Hatfield stated it was apparent to him Hoggan was making directed reassignments improperly. He testified:

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Arthur Drenth, Statement for OSC: Conversations That Took Place During Carpool (June 2, 2016) at 1.

³⁵² *Id.*

³⁵³ Hatfield Tr. at 107.

Q. How did you come into the information that Mr. Hoggan was using directed reassignments to move staff around?

A. It was observable. It was an observable act. There was no rhyme or reason. It was very unilaterally driven.³⁵⁴

Hatfield said that “there was no memorialized process”³⁵⁵ for the reassignments and that many had no legitimate justification:

Q. In this tour-of-duty request situation, do you know how FSD reassignments were chosen?

A. I don’t. I don’t. I think it was a combination of ways. I mean, I’m going to give them all credit that there were a couple of valid ones, you know, but I think there were quite a number that were not supportable by a credible or legitimate argument as to why it took place.³⁵⁶

Hatfield further stated, when he evaluated Hoggan’s performance towards the end of summer 2015, he observed deficiencies in his leadership skills. Hoggan made decisions based on favoritism rather than merit. He stated:

Q. Did you ever complete a performance evaluation of him?

A. As Deputy Administrator, I did.

Q. Do you remember when that was?

A. End of the summer of 2015, when the cycle was ending.

Q. Do you remember what rating you gave him?

A. I don’t. I know it was lower than he expected.

Q. Can you describe his performance leading up to that performance review?

A. Yeah. I just observed leadership skills that were not of the standard that was demanded by that office.

Q. Can you talk about those lacking leadership skills?

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 142.

³⁵⁶ *Id.*

- A. Yeah. There was very little transparency. There was a lot of distrust. There was a sense of, you know, in favor and out of favor for employees. There was very little observable reward for meritorious performance. And there had been the history of directed reassignments and the personnel moves, usually advancements or selections for open positions that didn't always follow an observable process of fair selection.³⁵⁷

3. *The Committee's Investigation Prompted TSA to Institute Reforms and Reach Settlements with Affected Employees*

Following whistleblower testimony in April 2016, former TSA Administrator Peter Neffenger testified before the Committee. Neffenger acknowledged directed reassignments had been used improperly. He stated:

I think it's important that we look for an independent review of that to determine whether or not there was improper use there. I will tell you that I don't think the manner in which we were doing directed reassignments prior to my arrival was justifiable. And even if it was appropriate, it wasn't done in a way that was open, transparent, fair, and otherwise controlled, which is why I changed it and we put significant controls on that process now.³⁵⁸

Neffenger said he would wait for the results of OSC's investigation and [d]epending on what they find, it may point to appropriate discipline."³⁵⁹

The controls Neffenger referred to were substantial changes TSA made to its policy on directed reassignments—in response to the Committee's investigation. On February 29, 2016, OHC Assistant Administrator Karen Shelton Waters circulated a memo suspending directed reassignments. The memo noted "management officials exercising the authority to effect a directed reassignment should consult with the Office of Human Capital (OHC) in advance of taking any action" and "[i]t has come to the attention of agency senior officials that this consultation with OHC is not being regularly sought and may have resulted in inconsistent applications of human capital policy and procedures."³⁶⁰

The memo also directed "[u]ntil further notice and effective immediately, Directed (Involuntary) Reassignments must be routed through the Office of Human Capital (OHC) for review and approval by AA/OHC Karen Shelton Waters" and all program offices requesting approval of a reassignment must send an action memo to OHC outlining their request.³⁶¹ Additionally, "[a]ll Directed Reassignments currently in process will be halted, reviewed, and

³⁵⁷ *Id.* at 134–35.

³⁵⁸ *TSA Hearing Part II.*

³⁵⁹ *Id.*

³⁶⁰ Memorandum from Karen Shelton Waters, Ass't Adm'r., Office of Human Capital, Transp. Sec. Admin. to staff, Transp. Sec. Admin, 1100 – *Temporary Suspension of Directed (Involuntary) Reassignments* (Feb. 29, 2016).

³⁶¹ *Id.*

possibly returned to the program office for further action, if the nature of action is unclear or isn't clearly supported as outlined in policy."³⁶²

In December 2017, then-Deputy Administrator Huban Gowadia stated, "[s]o Neffenger had already stopped, you know, for example directed reassignments. That policy continues. We only have directed reassignments if it is in the interest of the mission and if all other avenues exhausted."³⁶³ Kerner similarly testified that the use of directed reassignments had been severely limited in practice. She stated:

Q. So was Mr. Rhoades's directed reassignment, or attempted thereof, one of the last attempts to directly reassign somebody?

A. Well, after that, there was the directed reassignment that Admiral Neffenger did with regard to the FSD in Chicago. And I spoke about that. That was because of the meltdown of the lines in Chicago in the summer that he came onboard.

I'm not aware of other directed reassignments that don't have to do with closing offices or downsizing the workforce, things of that sort. Those are still being used as directed reassignments. In fact, I think we've actually gone to the point now where even where it would benefit the organization to issue a directed reassignment, we hesitate to do it because of all the criticism that's been leveled in connection with the practice.

Q. You think it's fair criticism?

A. It was fair criticism, yes.³⁶⁴

Although the use of directed reassignments has been severely curtailed, OSC continues to investigate a number of complaints of retaliation and actively remains in negotiations with TSA on some of them.

³⁶² *Id.*

³⁶³ Huban Gowadia Transcribed Interview 40, Dec. 20, 2017 (on file with the Committee) [hereinafter Gowadia Tr.].


³⁶⁴ Kerner Tr. at 100.

Office of Human Capital Communication
Human Capital Advisory Memo



Date: February 29, 2016

To: AAs, DAAs, BMOs, RDs, and FSDs

From: Karen Shelton Waters, Assistant Administrator, Office of Human Capital 

Subject: 1100 – Temporary Suspension of Directed (Involuntary) Reassignments

POC: Kristen Hukoveh, Kristen.Hukoveh@tsa.dhs.gov

References: TSA MD 1100.30-4 Permanent Internal Assignments
Associated TSA Handbook and Forms

Attachments: None

In accordance with TSA Management Directive 1100.30-4, Permanent Internal Assignments, management officials exercising the authority to effect a directed reassignment should consult with the Office of Human Capital (OHC) in advance of taking any action. It has come to the attention of agency senior officials that this consultation with OHC is not being regularly sought and may have resulted in inconsistent applications of human capital policy and procedures.

Until further notice and effective immediately, Directed (Involuntary) Reassignments must be routed through the Office of Human Capital (OHC) for review and approval by AA/OHC, Karen Shelton Waters. Program Offices requesting approval should direct an action memo for AA/OHC approval that outlines the requested Directed Reassignment action, following the requirements of TSA MD 1100.30-4, Section K. All Directed Reassignments currently in process will be halted, reviewed, and possibly returned to the program office for further action, if the nature of action is unclear or isn't clearly supported as outlined in policy.

OHC will work with representatives from each program office in the coming weeks to update TSA MD 1100.30-4, and associated handbook and forms, to ensure appropriate oversight and management responsibilities are correctly reflected in the policy as well as being adhered to in practice.

IV. DHS OGC and TSA Lacked Transparency and Withheld Information from Investigative Entities

Several TSA whistleblowers came forward to Congress, the Department of Homeland Security (DHS) Office of Inspector General (OIG), and the Office of Special Counsel (OSC) to describe instances of senior level misconduct and retaliation. Each of these entities launched inquiries in response to the mounting allegations. At the direction of DHS' Office of General Counsel, however, TSA withheld documents and information from Congress and OSC claiming they were protected attorney-client communications. DHS OGC and TSA maintained this position—even though the Committee subpoenaed the documents and the attorney-client privilege is not a valid basis for withholding documents from Congress and OSC.

A. Under the Guise of the “Attorney-Client” Privilege, DHS OGC and TSA Refused to Produce Documents to the Office of Special Counsel

The Office of Special Counsel (OSC) received tens of dozens whistleblower retaliation complaints from TSA employees, especially after TSA's use of directed reassignments. TSA publicly stated it wanted to wait until OSC finished its investigations before meting out discipline for retaliation. TSA, however, refused to produce the information and documents OSC needed to complete its investigations. Per guidance and direction from the DHS Office of General Counsel, TSA withheld information and documents from OSC on the basis of the attorney-client privilege—a privilege inapplicable to OSC.

1. The Office of Special Counsel (OSC) is responsible for investigating reprisal for whistleblowing

The Office of Special Counsel is an independent federal investigative and prosecutorial agency.³⁶⁵ It derives its authorities from the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act.³⁶⁶ OSC has the authority to investigate and prosecute violations of prohibited personnel practices, including whistleblower retaliation.³⁶⁷ Specifically, federal law prohibits agency officials “from taking, failing to take, or threatening to take a personnel action because of an employee’s whistleblowing.”³⁶⁸

2. TSA planned to wait until OSC completed its investigations before determining disciplinary actions

As outlined earlier in the report,³⁶⁹ TSA on multiple occasions retaliated against its whistleblowers. Many of these whistleblowers filed complaints with the Office of Special

³⁶⁵ Office of Special Counsel, About, <https://osc.gov/Pages/about.aspx> (last visited Aug. 29, 2018).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Office of Special Counsel, Prohibited Personnel Practices (PPPs), <https://osc.gov/Pages/PPP.aspx> (last visited Aug. 29, 2018).

³⁶⁹ *See* Section III.

Counsel (OSC). In fact, former Special Counsel Carolyn Lerner testified, when Congress extended whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act in 2012, “OSC has received more than 350 retaliation cases from the TSA employees.”³⁷⁰

In response to allegations of TSA whistleblower retaliation and senior level misconduct and mismanagement, the Committee held hearings in April and May 2016. At the May 2016 hearing, then-Administrator Peter Neffenger testified he was “waiting for the results of the Office of Special Counsel investigation[s]” to determine whether discipline was necessary for whistleblower retaliation.³⁷¹ Neffenger emphasized during the hearing he and TSA were reserving judgment until OSC finished investigating the retaliation claims. He testified:

Mr. Gosar. Now, part of the justification for Mr. Rhoades’s reassignment was to sever past loyalties due to suspicions he was a source for the media, which he denies. Do you consider this an appropriate justification?

Mr. Neffenger. Well, again, that matter is being investigated right now by the Office of Special Counsel. If they find that to be true, then of course it wasn’t appropriate.³⁷²

* * *

I will await the Office of Special Counsel’s review. I think it’s important that we look for an independent review of that to determine whether or not there was improper use there. I will tell you that I don’t think the manner in which we were doing directed reassignments prior to my arrival was justifiable. And even if it was appropriate, it wasn’t done in a way that was open, transparent, fair, and otherwise controlled, which is why I changed it and we put significant controls on that process now.³⁷³

* * *

I’m very interested in the results of the Office of Special Counsel investigation into the existing cases with the individuals who appeared before you. Depending upon those findings, I will take immediate action against that.³⁷⁴

* * *

³⁷⁰ *Transparency at TSA: Hearing Before the H. Comm. on Oversight & Gov’t Reform*. 115th Cong. (2017).

³⁷¹ *TSA Hearing Part II*.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

What I'm waiting for is to see what the results of the Office of Special Counsel investigation tells me with respect to a couple of the people who have made such allegations.³⁷⁵

3. *TSA withheld information from its document productions to OSC*

Despite Neffenger's commitment to take immediate action upon the completion of the OSC investigation, TSA deliberately withheld documents from OSC. Using the attorney-client privilege, TSA either refused to produce documents or produced heavily redacted documents, unnecessarily obstructing and prolonging OSC's investigations.

At the Committee's March 2, 2017 hearing, then-Special Counsel Carolyn Lerner testified OSC was struggling to get the necessary access to information and documents it needed for its investigations. She testified:

Two pairs of companion cases illustrate the challenges OSC faces in getting needed information from the TSA. The complainants are TSA officials who experienced involuntary geographical reassignments, a demotion, and a removal, all allegedly in retaliation for their protected whistleblower disclosures.

In these cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC has asked TSA to withdraw the claims of privilege, but both TSA and DHS rejected these requests. There are several problems with TSA's assertions of privilege.

First, as discussed above, shielding information from OSC conflicts with our statutory mandate to investigate the legality of personnel practices. When TSA doesn't disclose the reasons why they took an action against the whistleblower, we can't investigate whether it's retaliation.

In addition, TSA's attorney-client privilege review causes significant delays in investigations. In these four cases, OSC has spent months waiting for documents while TSA was reviewing responses for privilege.³⁷⁶

She further explained how TSA's actions were delaying OSC's investigations, which affected both OSC's lawyers and the whistleblowers. She stated:

Our lawyers are spending too much time negotiating for documents, time that could be much better spent advancing the investigation.

These delays also directly impact complainants who are waiting for relief, often when they are facing devastating situations at work. Despite the challenges created by TSA's privilege claims, OSC is committed to

³⁷⁵ *Id.*

³⁷⁶ *Transparency at TSA: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2017).

completing thorough investigations and protecting TSA employees.³⁷⁷

According to Lerner, “TSA has been somewhat of an outlier in its aggressive use of attorney-client privilege in several cases.”³⁷⁸ TSA’s practice was especially troublesome, because the attorney-client privilege is not applicable to OSC. As Lerner explained, OSC is “acting in the agency’s shoes.”³⁷⁹ She stated:

This is an interagency intergovernment investigation that Congress has asked us to conduct.

It’s not appropriate for any agency to claim attorney-client privilege when they’re producing documents to OSC. It would be the same thing with an IG or GAO, an agency would never claim attorney-client privilege during an IG investigation. It’s not appropriate to claim it during an OSC investigation either.³⁸⁰

4. DHS OGC instituted the practice to withhold documents and information on the basis of attorney-client privilege

The Committee learned at its March 2, 2017 hearing the Department of Homeland Security’s Office of General Counsel decided to withhold documents from OSC on the grounds they were privileged. Then-Acting Administrator Gowadia testified:

Chairman Chaffetz. The whistleblower says I’ve been retaliated against. The TSA says, no, they haven’t. There’s a dispute. OSC is one of the organizations, I think the primary organization, to resolve that dispute, correct?

Ms. Gowadia. Certainly.

Chairman Chaffetz. You agree with that?

Ms. Gowadia. Yes, sir.

Chairman Chaffetz. So what percentage of the information should the OSC be able to review in order to figure out the right conclusion?

Ms. Gowadia. Sir, the OSC should have all the information they need to figure it out.

Chairman Chaffetz. Define all of the information.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

Ms. Gowadia. Sir, I appreciate where you're headed with your question on the information we redact for attorney-client privilege issues. In that regard, I have to say we follow departmental guidance.³⁸¹

She further stated:

I don't believe information should be withheld from Congress unless there are certain provision, such as the attorney-client privilege, which, again, my hands are tied by departmental policy. I cannot take unilateral action, because there are ripple effects across the Department.³⁸²

When questioned about who specifically within DHS, Gowadia testified then-Acting General Counsel Joseph Maher would be the best person to talk to about DHS' policy to withhold information from OSC.³⁸³

TSA Chief Counsel Francine Kerner confirmed Maher made the legal decision. She testified:

Q. [W]hat is TSA's legal obligation to the Office of Special Counsel?

A. We follow our legal obligation to provide them with documents and witnesses, and we talk to them on a frequent basis about cases they have under review.

Q. Are there any limitations to this legal obligation?

A. We assert privilege –

Q. Specifically –

A. – with regard to attorney-client or attorney work product. We do. That's the Department's direction.

Q. The Office of General Counsel for the Department of Homeland Security?

A. That's correct.

Q. Who within the Office of General Counsel made that determination?

A. Well, certainly the acting general counsel has made that

³⁸¹ *Transparency at TSA: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2017).

³⁸² *Id.*

³⁸³ *Id.*

determination. He sent letters to the committee explaining what the Department's position is.

Q. And that person's Joe Maher?

A. Joe Maher.

Q. Maher?

A. M-a-h-e-r.

Q. Did you participate in that decision at all?

A. No. It's the decision of the Department. I certainly have discussed the decision with him in the sense that I abide by it. But in terms of what the Department's position should be with regard to asserting privilege, that is a departmental position and, at times, an administrative position; it is not a decision that is left for me as chief counsel to make.³⁸⁴

DHS OGC confirmed it was its decision and policy to withhold these documents. In a March 10, 2017 letter to the Committee, Maher made several assertions about the Department's policy on the attorney-client privilege. Maher stated "The Department's view is that these communications, in which managers seek legal advice and counsel in ongoing personnel matters, are not subject to routine disclosure to OSC."³⁸⁵

Although we have an important history of working cooperatively and productively with OSC, we have a difference of legal opinion with respect to the disclosure of attorney-client communications. The Department's view is that these communications, in which managers seek legal advice and counsel in ongoing personnel matters, are not subject to routine disclosure to OSC. TSA and the Department are not outliers in this regard, we understand that other agencies hold a similar view, and some of those have even published regulations that govern their policies. Our view on this matter is informed by our fundamental concern in ensuring compliance with the law throughout the Department. This, of course, includes compliance with personnel laws, including the whistleblower laws that were discussed at length in the March 2 hearing. The

The Department's view failed to recognize OSC's need to have access to information so it could complete its whistleblower reprisal investigations, as OSC is legally obligated to do. Maher further stated OSC can also issue a subpoena for the documents—failing to acknowledge such a step would only further delay OSC's investigations.³⁸⁶

³⁸⁴ Kerner Tr. at 20–21.

³⁸⁵ Letter from Joseph Maher, Acting Gen. Counsel, Dep't. of Homeland Sec. to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Mar. 10, 2017).

³⁸⁶ *Id.*

It is worth noting that OSC has not pursued available legal processes in the cases discussed at the March 2 hearing. If OSC believes that the Department has not provided OSC with information required under the law, OSC can issue a subpoena and apply to the Merit System Protection Board to enforce the subpoena. We believe that we would prevail in defending against such a subpoena, but OSC has not taken the steps available through this legal process. In

The Committee formally requested a transcribed interview of Joseph Maher in a January 18, 2018 bipartisan letter to DHS Secretary Kirstjen Nielsen to further understand the Department's policy on the attorney-client privilege.³⁸⁷ Maher has refused to appear for a transcribed interview, withholding material facts from the Committee. The Committee has been forced to issue a subpoena for Maher's deposition.³⁸⁸

B. TSA Refused to Comply with a Congressional Requests and a Congressional Subpoena

Following the March 2, 2017 hearing, the Committee sent a letter to Acting TSA Administrator Huban Gowadia requesting documents. DHS Acting General Counsel Joseph Maher responded on behalf of TSA refusing to produce all the requested documents. The Committee then issued a subpoena for those documents to Acting TSA Administrator Gowadia. Again, DHS OGC responded on behalf of TSA refusing to produce the compelled documents. The only accommodation TSA made was providing a belated *in camera* review. This review solidified the Committee's concerns. TSA's redactions—done at the direction of the DHS OGC—were applied excessively, inconsistently, and without legal justification.

On March 6, 2017 the Committee requested the following documents from Acting TSA Administrator Gowadia:

1. All documents which OSC requested from TSA between January 1, 2014, and December 31, 2016, but which TSA did not produce or which it produced with redactions;
2. A privilege log showing all instances in which TSA withheld information from OSC between January 1, 2014, and March 2, 2017, and the associated privilege(s) invoked;
3. The name of each individual at TSA or the Department of Homeland Security (DHS) who has advised TSA to withhold information from OSC or to apply the attorney-client privilege with regard to document requests from OSC between March 2, 2014, and March 2, 2017;

³⁸⁷ Letter from Hon. Trey Gowdy, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform to Hon. Kirstjen Nielsen, Sec., Dep't. of Homeland Sec. (Jan. 18, 2018).

³⁸⁸ Deposition Subpoena to Joseph Maher (Sept. 14, 2018).

4. All documents and communications relating to the discipline of Steve Colon, Office of Chief Counsel;
5. All documents referring or relating to procedures or guidelines for the application of attorney-client privilege or engaging with OSC on investigations that were created, changed, or that TSA relied upon in the past year; and
6. TSA's plan for producing to OSC unredacted copies of all documents requested by OSC in any open cases and the expected date of completion.

DHS Acting General Counsel Maher responded on behalf of TSA, stating in a March 10, 2017 letter "the Department objects to the demand that it produce all privileged communications whether withheld in their entirety or redacted in part."³⁸⁹

In order to protect the full and frank attorney-client communications that occur during the deliberative process, the Department objects to the demand that it produce all privileged communications whether withheld in their entirety or redacted in part. In order to accommodate the oversight interests of the Committee, however, privilege logs identifying information withheld are enclosed for the currently active OSC matters. Of the fourteen currently active matters, TSA has enclosed privilege logs for the ten in which privilege was or has been asserted. TSA has not asserted privilege or withheld any information upon claim of privilege for the remaining four active matters.

The Department offered to produce the requested privilege logs but not the actual documents, claiming they were protected attorney-client communications. Maher also stated, however, "[t]he Department has not developed written procedures or guidelines for the handling of attorney-client communications in response to OSC requests."³⁹⁰

Because DHS and TSA refused to produce all the requested documents, the Committee issued a document subpoena to then-Acting TSA Administrator Gowadia on March 17, 2017. The Committee subpoenaed the following documents.³⁹¹

³⁸⁹ Letter from Joseph Maher, Acting Gen. Counsel, Dep't. of Homeland Sec., to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Mar. 10, 2017).

³⁹⁰ *Id.*

³⁹¹ Subpoena to Huban A. Gowadia (Mar. 17, 2017).

SCHEDULE

In accordance with the attached schedule instructions, you, Huban A. Gowadia, are required to produce all records described below:

1. All documents referenced in the privilege logs the Department of Homeland Security produced to the Committee on March 10, 2017; and
2. All documents and communications referring or relating to the potential discipline of Steve Colon, Office of Chief Counsel.

Committee staff also met with Department OGC staff on March 17, 2017. Committee staff explained it has been separately and independently investigating whether TSA is abusing the attorney-client privilege as a means to avoid oversight.³⁹² Further, this inquiry was part of a larger investigation dating back to the fall of 2015 into TSA's personnel practices. The Department OGC staff failed to alleviate the Committee's concerns about these allegations.³⁹³

DHS Acting General Counsel Maher responded to the subpoena. On March 31, 2017—the date the documents were due to the Committee—Maher sent a letter to the Committee stating the Department is “not in a position to produce those documents at this time,” claiming again the documents were protected by the attorney-client privilege.³⁹⁴ This privilege was the only basis for which the Department decided to withhold the documents. In the letter, Maher also accused the Committee of trying to do backdoor discovery on behalf of OSC. He stated, “[w]e do not believe that oversight requests are a proper means for discovery by OSC or other non-congressional bodies.”³⁹⁵

In a May 2, 2017 bipartisan letter, the Committee demanded TSA “comply with [its] legal obligations immediately” pursuant to the Committee's subpoena.³⁹⁶ The Committee further stated:

It should be clear that the Committee's subpoena is not an attempt at ‘discovery by OSC or other non-Congressional bodies,’ as it was termed in the March 31 letter. Rather, the Committee issued the subpoena to further

³⁹² Meeting between Committee staff and Dep't. of Homeland Sec. Office of Gen. Counsel staff (Mar. 17, 2017). *See also*, Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform to Hon. Kirstjen Nielsen, Sec. Dep't of Homeland Sec. (May 2, 2017).

³⁹³ *Id.*

³⁹⁴ Letter from Joseph Maher, Acting Gen. Counsel, Dep't of Homeland Sec., to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Mar. 31, 2017).

³⁹⁵ *Id.*

³⁹⁶ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform to Hon. Kirstjen Nielsen, Sec., Dep't of Homeland Sec. (May 2, 2017).

its own investigation and to obtain answers to specific longstanding questions.³⁹⁷

The Committee also requested Acting Administrator Gowadia, Chief Counsel Francine Kerner, and TSA counsel Steven Colon for transcribed interviews with the Committee.³⁹⁸

On May 11, 2017, Committee staff met with Department staff.³⁹⁹ At the meeting, the Department staff assured Committee staff the subpoenaed documents were innocuous.⁴⁰⁰ Committee staff offered to review the documents *in camera* to determine whether the documents were in fact necessary.⁴⁰¹

Two weeks after the meeting, on May 26, 2017, Acting DHS General Counsel Maher sent a letter refusing to provide the Committee access to the documents.⁴⁰² He also refused to provide the requested witnesses—Gowadia, Kerner, and Colon—for transcribed interviews, stating “[w]hile we will make these persons available for meetings, we believe that the level of formality associated with the transcribed interviews is unnecessary.”⁴⁰³ Maher also made clear DHS is responsible for how TSA responds to Congressional requests, not TSA. The letter states, “[t]he Department—not [Acting TSA Administrator] Dr. Gowadia—is making determinations on the handling of the documents.”⁴⁰⁴ Maher did not provide information about who within the Department is making those determinations.

The Committee continued to maintain its demand for the subpoenaed documents and request for the transcribed interviews of Gowadia, Kerner, and Colon. In a November 16, 2017 bipartisan letter, the Committee asked DHS Acting Secretary Duke to immediately “arrange for delivery of the compelled documents and to schedule [the] transcribed interviews,” or “the Chairman will shortly issue deposition subpoenas for these witnesses.”⁴⁰⁵ Subsequent to the letter, DHS finally produced Gowadia, Kerner, and Colon for transcribed interviews.⁴⁰⁶ DHS, however, only produced the compelled documents *in camera*. While the parameters of the review were inadequate, Committee staff were able to determine TSA’s redactions, which DHS OGC directed, were applied excessively, inconsistently, and without legal justification. The documents were also substantively relevant to whistleblower retaliation.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ Meeting between Committee staff and Dep’t of Homeland Sec. staff (May 11, 2017). *See also*, Letter from Hon. Trey Gowdy, Chairman, H. Comm. on Oversight & Gov’t Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform to Hon. Elaine Duke, Acting Sec. Dep’t of Homeland Sec. (Nov. 16, 2017).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Letter from Joseph Maher, Acting Gen. Counsel, Dep’t of Homeland Sec., to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform (May 26, 2017).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ Letter from Hon. Trey Gowdy, Chairman, H. Comm. on Oversight & Gov’t Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov’t Reform to Hon. Elaine Duke, Acting Sec. Dep’t of Homeland Sec. (Nov. 16, 2017).

⁴⁰⁶ The transcribed interviews took place on December 5, 2017, December 7, 2017, and December 20, 2017.

Despite reiterating its demand for the compelled documents in the Committee's January 18, 2018 letter to Secretary Nielsen, DHS nor TSA have produced the documents.