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## SPECIAL REVIEW

# TSA's Handling of the 2015 Disciplinary Matter Involving TSES Employee (Redacted)

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January 8, 2018  
OIG-18-35



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Department of Homeland Security

Washington, DC 20528 / [www.oig.dhs.gov](http://www.oig.dhs.gov)

January 8, 2018

MEMORANDUM FOR: The Honorable David P. Pekoske  
Administrator  
Transportation Security Administration

FROM: John V. Kelly   
Acting Inspector General

SUBJECT: TSA's Handling of the 2015 Disciplinary Matter  
Involving TSES Employee

In April 2016, the House Committee on Oversight and Government Reform asked the Department of Homeland Security (DHS) Transportation Security Administration (TSA) (see Attachment A) to review the disciplinary process that resulted in the issuance of a notice of proposed removal in June 2015 to [REDACTED], former Assistant Administrator of TSA's [REDACTED] (referred to herein as "the TSES Employee").<sup>1</sup> Admiral Peter Neffenger, the TSA Administrator at the time of the congressional request, asked the DHS Office of Inspector General (OIG) to conduct an independent review of the matter (see Attachment B).

DHS OIG conducted a review to determine the extent to which TSA employees complied with relevant policies and followed standard procedure in the handling of the TSES Employee's disciplinary matter. DHS OIG interviewed nine witnesses over the course of its review, including individuals at TSA Headquarters, a senior management official at DHS Headquarters, and a former TSA employee. DHS OIG also

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<sup>1</sup> DHS OIG has determined that, in light of the particular issues raised in this report, the public interest in disclosure outweighs the personal privacy interest of certain of the individuals referenced herein. Accordingly, because significant public benefit would result from disclosure of the information contained in this report, DHS OIG has left unredacted the names of certain individuals associated with this matter.



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reviewed hundreds of records provided by TSA, including emails, policies, and other documents associated with this disciplinary matter.

DHS OIG's review determined that TSA senior leaders deviated from standard policy and practice in a number of key respects indicating that the TSES Employee received unusually favorable treatment in the resolution of his disciplinary matter. Our review specifically found that former Deputy Administrator Mark Hatfield, Chief Counsel Francine Kerner, and former Office of Professional Responsibility Assistant Administrator Heather Book each 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.

### I. Factual Findings

#### a. TSA's Office of Professional Responsibility (OPR)

##### i. *OPR's Mission*

TSA established the OPR in September 2010 to “provide greater consistency in misconduct penalty determinations and a more expedient and standardized adjudication process.”<sup>2</sup> Among other things, OPR was tasked with reviewing and adjudicating all allegations of misconduct involving persons in the Transportation Security Executive Service (TSES) and J through M pay-bands, as well as Federal Security Directors (FSDs), Deputy FSDs, Assistant FSDs, and Deputy Assistant FSDs.<sup>3</sup> OPR was also tasked with tracking and monitoring misconduct cases across TSA “to ensure timely, fair, and consistent discipline throughout the agency ... ensuring that the disciplinary process treats all TSA employees the same regardless of title or position.”<sup>4</sup>

##### ii. *OPR's Standard Process*

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<sup>2</sup> Action Memo for Administrator John Pistole, *Office of Professional Responsibility*, September 2010.

<sup>3</sup> TSA Management Directive No. 1100.75-7, *Office of Professional Responsibility*.

<sup>4</sup> Action Memo for Deputy Administrator John Halinski, *Recommendation to expand the Office of Professional Responsibility's jurisdiction to include adjudication of discipline for all J-Band and Transportation Security Manager positions*, March 2014 (Halinski Action Memo).



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Allegations involving misconduct by TSA employees in the TSES are first investigated by TSA's Office of Inspections (OOI). Upon completing its investigation, OOI prepares a Report of Investigation (ROI) setting forth its factual findings. OOI transmits the ROI and supporting materials to OPR to determine whether and what disciplinary action is warranted. OPR is divided into four separate units, each with its own Unit Chief. When OPR receives a new ROI from OOI, the matter is assigned to one of the four OPR units on a rotating basis. When a TSES employee's conduct is under review, the Unit Chief for the assigned unit acts as the Proposing Official.

The Proposing Official reviews OOI's factual findings. If the Proposing Official finds the information and materials provided by OOI insufficient to adjudicate the matter, he or she may ask OOI for additional investigation and/or information. The Proposing Official does not undertake an independent investigation of the facts. Upon review of the record, the Proposing Official will make a recommendation regarding appropriate disciplinary or corrective action, which is reflected in a draft Notice of Proposed Action (NPA). The NPA must include, among other things, the charge and specification for each charge (including a description of the evidence that supports each charge and a listing of all the documents relied upon to support the action); the proposed penalty; and a discussion of the *Douglas* mitigating and aggravating factors.<sup>5</sup>

The Proposing Official, in his or her discretion, may request a legal sufficiency review of the NPA by an attorney in TSA's Office of Chief Counsel (OCC). As part of the legal sufficiency review, the OCC attorney may consider whether there is sufficient evidence to sustain the action, whether there is a nexus between a government interest and the underlying misconduct, and whether the proposed penalty is reasonable.

The final NPA is delivered to the employee in person. The employee has seven days to present an oral or written response to the NPA, unless an extension is granted for good cause shown. Any written reply, including any supporting materials, is provided to the Deciding Official, who is listed by name in the NPA. For TSES employees, the OPR Assistant

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<sup>5</sup> TSA Management Directive No. 1100.75-3, *Addressing Unacceptable Performance and Conduct*. The *Douglas* factors are a set of factors set forth by the Merit System Protection Board that federal agencies must consider when taking disciplinary action against employees.



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Administrator or Deputy Assistant Administrator typically serves as the Deciding Official. The Deciding Official is “walled off” from the earlier stages of the process to ensure that he or she is not improperly influenced by OOI or the Proposing Official’s view of the case.

The Deciding Official evaluates the charges and specifications as set forth in the NPA, the supporting documentation, the employee’s oral and/or written reply, and the mitigating and aggravating *Douglas* factors. Based on this review, the Deciding Official drafts a decision indicating whether the Agency will impose the proposed, or any other, disciplinary action. The employee may appeal the decision to the Merit Systems Protection Board (MSPB).

On occasion, the Agency may enter into settlement negotiations with an employee to resolve a disciplinary action. Witnesses reported that, prior to OPR’s creation, employees would often be presented a “last chance agreement” at the same time as the NPA. The employee could either accept the terms of the Agency-offered settlement agreement or receive the NPA and take his or her chances with the Deciding Official. In the typical case, the “last chance agreement” would allow the employee to voluntarily resign in lieu of being removed. This practice appears to have been discontinued.

In February 2013, TSA issued Management Directive No. 1100.55-9, *Settlement Agreements*, which modified the process for negotiating settlements with senior employees. In particular, the Directive 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.

b. TSA’s Handling of the TSES Employee’s Disciplinary Matter

i. *Investigation of Complaint Against the TSES Employee*

From [REDACTED], the TSES Employee served in the TSES as the Assistant Administrator (AA) for TSA’s [REDACTED]. In this role, he reported directly to TSA Deputy Administrator (DA) Mark Hatfield. On December 10, 2014, OOI received an anonymous complaint alleging (1) the TSES Employee was engaged in an inappropriate workplace relationship with a subordinate employee (referred to here as “Jane Doe”), and (2) he violated TSA hiring policies when he hired a colleague for a Competitive Service position outside the



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competitive process. OOI began investigating the complaint on January 14, 2015.

OOI interviewed the TSES Employee on March 12, 2015. During the interview, investigators repeatedly asked the TSES Employee whether he had engaged in an intimate or sexual relationship with Jane Doe, including whether he ever sent her any communications of a sexual nature. The TSES Employee repeatedly denied having anything other than a professional relationship with Jane Doe, claiming the relationship was “non-romantic, non-sexual.” However, when investigators confronted the TSES Employee with a personal email he sent to Jane Doe that contained sexually explicit statements, he admitted to having an “emotionally intimate” relationship with her that, he conceded, was inappropriate for the workplace.

OOI completed its investigation on March 27, 2015.

ii. *Referral of the TSES Employee’s Matter to OPR*

On or around April 8, 2015, an OPR Unit Chief (UC) received OOI’s ROI relating to the TSES Employee. Because the TSES Employee was a member of the TSES, per standard practice, the UC was assigned to be the Proposing Official and the OPR Acting Deputy Assistant Administrator (ADAA) was designated the Deciding Official. As the designated Deciding Official, the ADAA was walled off from any communications about the TSES Employee’s case.

Based on the facts reflected in the ROI and supporting materials; the guidance provided in TSA Management Directive No. 1100.75-3, *Addressing Unacceptable Performance and Conduct*; and input from an OCC attorney in the Employment, Civil Rights, and Labor Policy division; the UC brought the following four charges against the TSES Employee:

- (1) Poor Judgment. The UC concluded that the TSES Employee demonstrated poor judgment by maintaining an inappropriate relationship with Jane Doe, an employee he mentored and supervised. The TSES Employee’s inappropriate communications to Jane Doe continued even after she asked him to cease contacting her for non-work related reasons.



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- (2) Lack of Candor. The UC concluded that the TSES Employee demonstrated lack of candor when, in his sworn testimony, he repeatedly denied having an intimate or sexual relationship with Jane Doe until confronted with a personal email he sent to Jane Doe that included sexually explicit comments. The TSES Employee ultimately admitted to having an “emotionally intimate” relationship with Jane Doe that he conceded was inappropriate for the workplace. The TSES Employee also asserted that he disclosed his relationship with Jane Doe to his supervisor and the counsel for OOI, a claim both individuals refuted.
- (3) Inappropriate Conduct. The UC concluded that the TSES Employee engaged in inappropriate conduct by violating TSA hiring practices to promote a colleague to a Competitive Service position outside the competitive process. Specifically, when a posting for a K-Band Executive Advisor position in the TSES Employee’s office was posted, he contacted an employee and told her to apply. The employee applied, but was not selected by HR for the Best Qualified list. After interviewing several individuals, the TSES Employee made no selection and closed the position. He then directed that the employee he previously contacted be non-competitively promoted to the Executive Advisor position.
- (4) Unprofessional Conduct. The UC found that the TSES Employee engaged in unprofessional conduct by forwarding an email to a subordinate employee in which he referred to an Assistant Administrator as a “dick.”

In determining the appropriate penalty to propose, the UC considered the nature of the misconduct reflected in the charges and its relationship to the TSES Employee’s duties as AA [REDACTED]. As an AA and a member of TSA’s senior leadership team, the TSES Employee was subject to a higher standard of conduct than lower-level employees. The UC considered the lack of candor offense especially serious when committed by a member of senior leadership — particularly one, like the TSES Employee, charged with [REDACTED]. The UC also found the TSES Employee’s inappropriate relationship with Jane Doe, which he attempted to pursue even after she



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told him his advances were making her uncomfortable, demonstrated a serious lack of judgment.<sup>6</sup>

Following standard OPR procedure, the UC next weighed these aggravating factors against several mitigating factors, including the TSES Employee's [REDACTED] years of federal service, [REDACTED] years of military service, exceptional performance rating, and lack of a disciplinary record. Nevertheless, after consulting TSA's Table of Offenses and Penalties (TOP) (May 15, 2014), she concluded that removal was warranted under the circumstances, a determination with which OCC concurred.

Specifically, based on TSA's "Guidelines on Using the Table of Penalties for Appropriate Discipline for Common Offenses" (TOP Guidelines), the aggravating factors — *e.g.*, the TSES Employee's high position within the Agency, the potential impact of his misconduct on the Agency's reputation, and his failure to report the misconduct — warranted applying the "Aggravated Penalty Range" listed in the TOP. For the lack of candor offense (E.2), the TOP recommends removal and does not list a separate aggravated penalty range.<sup>7</sup> Both the offensive language and failure to follow TSA policy offenses (B.5 and D.4, respectively) carry aggravated penalties up to removal.<sup>8</sup>

Accordingly, the UC drafted a Notice of Proposed Removal (NPR). Following standard procedure, she considered the TSES Employee's potential for rehabilitation in the NPR, and whether alternative sanctions would adequately address his misconduct. She stated: "Although your decision to engage in an inappropriate relationship while serving as a member of the senior leadership team at TSA showed poor judgment, your subsequent attempts to conceal your actions by being less than candid regarding multiple matters while being questioned by OOI has irretrievably undermined TSA's ability to trust you." Further, she found that "[p]romoting an employee to a K-Band position noncompetitively ... is inappropriate and another example of poor judgment." The UC concluded that "[t]he seriousness of your misconduct therefore supports

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<sup>6</sup> Consideration does not appear to have been given to the legal liability to which the TSES Employee's misconduct potentially subjected TSA — *e.g.*, a sexual harassment claim.

<sup>7</sup> The "Mitigated Penalty Range" is a 14-day to 30-day suspension.

<sup>8</sup> The Aggravated Penalty Range for both B.2 and D.4 is a 15-day suspension to removal.



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my conclusion that you lack any rehabilitative potential, and that no lesser penalty would serve to correct your behavior, deter such conduct in the future, or impress upon you the seriousness of your actions.”

The UC believes she finalized the draft NPR sometime in late-May 2015.

iii. *Senior Management’s Involvement in the TSES Employee’s Case*

In the typical case, the final NPR would have been served on the TSES Employee and he would have been given an opportunity to present an oral or written reply, including any potentially mitigating information, to the OPR ADAA, the person originally designated to serve as the Deciding Official in the TSES Employee’s case. However, at some point in early June 2015, DA Hatfield approached the Acting Administrator of TSA, General Francis Taylor,<sup>9</sup> to raise the issue of the TSES Employee’s discipline. According to General Taylor, DA Hatfield was concerned that OPR was proposing the removal of a member of the TSES without first obtaining input from senior leadership.<sup>10</sup> DA Hatfield provided General Taylor a memorandum describing the TSES Employee’s alleged misconduct.<sup>11</sup> General Taylor believed Hatfield was raising the matter to his attention because he had instructed Hatfield to keep him informed of any matters of major concern during his tenure as Acting Administrator.

After reviewing the information provided to him, General Taylor scheduled a meeting with DA Hatfield, OPR Assistant Administrator (AA) Heather Book, and Chief Counsel Francine Kerner. The meeting appears

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<sup>9</sup> In June 2015, after the previous TSA Administrator retired from his position, Secretary Jeh Johnson requested that his Undersecretary for Intelligence and Analysis, General Francis Taylor, temporarily serve as the Acting Administrator of TSA until a replacement could be appointed and confirmed. General Taylor held this position for only a few weeks.

<sup>10</sup> Per standard OPR procedure at the time, senior leadership was not afforded an opportunity to provide “input” on disciplinary matters involving members of the TSES. OPR’s process was structured this way to safeguard OPR’s objectivity and independence, and to ensure that members of the TSES were treated fairly and consistently across the Agency.

<sup>11</sup> General Taylor could not locate a copy of the memorandum provided to him by DA Hatfield. Upon reviewing a copy of the NPR provided by DHS OIG, General Taylor could not say whether the memorandum Hatfield provided him was some version of the Notice, or some other document characterizing the TSES Employee’s misconduct.



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to have occurred on or around Friday, June 12, 2015. At the outset, General Taylor, who had been serving in the Acting Administrator role for approximately one week and was entirely unfamiliar with TSA's disciplinary policies and procedures, asked the group whether it was appropriate for him to weigh in on a disciplinary matter like the one before them. No one objected. Neither did any of the meeting attendants explain to General Taylor that his involvement would mark a significant deviation from standard process and historical practice.

General Taylor then asked each person at the meeting to share his or her thoughts about whether the TSES Employee's removal was warranted under the circumstances. According to Chief Counsel Kerner and AA Book, DA Hatfield supported a lesser penalty.<sup>12</sup> He believed the lack of candor charge was unfair because it was based on a trap set by the OOI investigators — *i.e.*, the investigators solicited a denial from the TSES Employee about sexually explicit communications with Jane Doe when the investigators had, in their possession, evidence of a sexually explicit communication. DA Hatfield also felt the TSES Employee's long history of exemplary service with TSA warranted mitigation of the penalty.

AA Book, on the other hand, voiced her strong support for the proposed removal. She informed General Taylor that, based on TSA's TOP, the lack of candor and inappropriate relationship offenses warranted removal. She also noted that, because Deciding Officials often reduce the penalty during the final stage of review, it is better for the proposal to put forward the highest supportable penalty.

Chief Counsel Kerner did not express a strong opinion either way at the meeting, telling General Taylor that removal was supported by the facts, but also suggesting that a lesser punishment would be appropriate.<sup>13</sup> She also described for General Taylor some of the litigation risks associated with proposing removal. Kerner told DHS OIG that, although she did not say so at the meeting, she personally agreed with DA Hatfield's position, particularly because she felt the OOI investigators had unfairly entrapped the TSES Employee. Kerner also indicated to DHS OIG that she felt sorry for the TSES Employee, who she believed

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<sup>12</sup> DA Hatfield, who has retired from the federal service, refused DHS OIG's requests for an interview.

<sup>13</sup> Per the TOP Guidelines, "a demotion may always be considered as an option when the applicable penalty range includes removal."



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behaved inappropriately, in part, because of mixed signals he received from Jane Doe.

Ultimately, based on the information DA Hatfield had previously provided to him about the TSES Employee's case and the input he received during the June 12, 2015 meeting, General Taylor concluded that the TSES Employee's offense relating to Jane Doe was a "crime of emotion" and an "affair of the heart" and, as such, did not warrant removal. He firmly believed that the TSES Employee should be penalized, but he considered "relief from command and reassignment" to be a sufficiently severe punishment to send a strong message to the TSES Employee and deter any future misconduct.

The meeting concluded without General Taylor specifying, or the group explicitly agreeing on, the next steps that should be taken in the matter. However, AA Book left the meeting with the understanding that DA Hatfield would be replacing the OPR ADAA as the Deciding Official and that — through some as-yet-unknown mechanism — the TSES Employee's penalty would end up being something less than removal. Chief Counsel Kerner similarly recalled that there was no direction given at the meeting as to how to implement the decision to lessen the TSES Employee's punishment.

On June 12, 2015, following the meeting with General Taylor, AA Book contacted the OCC attorney who previously had provided legal support to the UC on the TSES Employee's matter. AA Book asked the attorney to draft a revised Notice by the end of the day removing the lack of candor charge and proposing suspension instead of removal. The attorney found the request highly unusual given the quick turnaround time and the amount of work that had already gone into evaluating the legal sufficiency of the proposed removal. Nonetheless, the attorney completed and sent a draft of a proposed suspension to AA Book.

That same day, AA Book met with the ADAA to discuss the TSES Employee's case. AA Book asked the ADAA if he would take the UC's place as the Proposing Official and propose a 14-day suspension with a directed reassignment following the suspension. The ADAA told AA Book he was not comfortable with her request, in large part because it would require him to reach a particular conclusion about disciplinary action before having had the opportunity to independently and objectively



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review the facts (as the designated Deciding Official, the ADAA had been walled off from the matter up to this point).<sup>14</sup>

AA Book also approached the UC to discuss with her the possibility of changing her recommendation from a proposed removal to a proposed 14-day suspension. The UC was unwilling to change the proposal, which she continued to feel was absolutely warranted given the serious misconduct at issue. Ultimately, AA Book abandoned her efforts to change the proposed penalty in the Notice. However, in the final version of the NPR, the ADAA was removed as the designated Deciding Official, and DA Hatfield was listed in his place.

iv. *TSA's Settlement With the TSES Employee*

On Monday morning, June 15, 2015, Chief Counsel Kerner met with Steve Colon, Assistant Chief Counsel for Administrative Litigation, OCC. Kerner discussed the TSES Employee's proposed removal with Colon, and explained that the Agency wanted to settle the matter by offering the TSES Employee a suspension and reassignment in lieu of removal.<sup>15</sup> Colon found the proposed approach odd because, at the time, the Agency did not typically offer settlements *sua sponte* to employees who engaged in misconduct. Nevertheless, Colon began working on draft settlement language.

Shortly thereafter, the ADAA was called into a meeting with Chief Counsel Kerner and Colon to discuss service of the NPR on the TSES Employee. Given that Colon typically handles settlements for the Agency, Colon's presence at the meeting immediately suggested to the ADAA that a settlement may be in the works. The ADAA found this "odd" given that the affected employee is the party who typically initiates settlement negotiations, not the Agency. Further, having reviewed the NPR, the ADAA felt the case against the TSES Employee was "solid" and did not understand why the Agency was rushing to settle the matter.

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<sup>14</sup> Following his conversation with AA Book, the ADAA began keeping private, contemporaneous notes of the handling of the TSES Employee's case, which the ADAA characterized as extremely "odd."

<sup>15</sup> None of the witnesses was certain who made the decision to initiate a settlement with the TSES Employee, though the idea appears to have originated with Chief Counsel Kerner.



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At 2:36 p.m. on June 15, 2015, the UC digitally signed the NPR. At 2:44 p.m., Chief Counsel Kerner emailed the TSES Employee. In the email, Kerner told the TSES Employee that she had spoken with DA Hatfield and “an agreement that would permit you to continue working at TSA can be reached.” According to the TSES Employee, Kerner’s email caught him off guard — at the time he received it, he had not seen the NPR and was not even aware that the Agency was considering his removal.

The ADAA delivered the NPR to the TSES Employee around 3:00 p.m. on June 15, 2015. At approximately 3:45 p.m. that same day, Colon met with the TSES Employee to propose the terms of a settlement to resolve the matter. The proposed terms included a 14-day suspension followed by the TSES Employee’s reassignment to a new, as-yet-unspecified position. At 4:19 p.m., Colon emailed DA Hatfield and Chief Counsel Kerner to inform them that the TSES Employee agreed to the terms of the settlement in principle, but was unwilling to sign an agreement without first learning the details of his reassignment.

According to the TSES Employee, DA Hatfield initially verbally indicated to him that he (the TSES Employee) would be reassigned to a TSES position. An early draft of the settlement agreement, circulated at 4:58 p.m. on June 15, 2015, similarly reflects reassignment to a position within the TSES. On June 17, 2015, the TSES Employee emailed DA Hatfield indicating that he would agree to a settlement reassigning him to a TSES position in the DC commuting area. However, by 5:19 p.m. that same day, the draft settlement agreement was modified to reflect reassignment to a position in the lower L-Band pay level and banishment from the TSES for one year.

Though an apparent demotion, because of the TSES Employee’s years of service at TSA, this offer permitted him to continue to receive the same salary he had been receiving as a member of the TSES. Witnesses could not recall what prompted this revision, though Colon recalled that DA Hatfield intended to find a position for the TSES Employee that would enable him to “save pay” — *i.e.*, continue to make what he was making as a TSES. Chief Counsel Kerner told DHS OIG she was not consulted on this point. Similarly, General Taylor reported that he was not consulted on this point. He further stated that he likely would not have approved the settlement had he known — in his opinion, a demotion should be a demotion in more than just name.



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The revised agreement was emailed to the TSES Employee at 6:22 p.m. on June 17, 2015. On June 18, 2015, the TSES Employee returned a signed copy of the agreement to OCC. DA Hatfield signed the agreement on behalf of the Agency. The ADAA was asked to sign on behalf of OPR because AA Book, who would typically sign such agreements, was on leave. However, because the ADAA believed the case for the TSES Employee's removal was strong, he was not comfortable signing the settlement agreement, which he felt achieved an unjust result. Accordingly, the ADAA called AA Book while she was on leave and obtained her permission to sign the agreement in her name.

On June 29, 2015, following his 14-day suspension, the TSES Employee reported to his new position as Deputy Director for [REDACTED] in the TSA [REDACTED].<sup>16</sup> The new position, in which he continues to serve, is in the L-Band pay level (lower than TSES, but higher than a traditional GS-15), and he has continued to receive the same pay that he had been receiving as a member of the TSES.

## II. Analysis

TSA's handling of the TSES Employee's disciplinary matter deviated from standard practice in several key respects. Initially, the matter 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. As described above, the UC's actions as the Proposing Official followed standard procedure, and her analysis and conclusions were informed by the facts and guided by relevant TSA policies. Further, the proposed penalty (*i.e.*, removal) appears to have been warranted — if not required — by TSA's Table of Penalties.

However, the insertion of senior management, including DA Hatfield and General Taylor, into the process caused the process to go off course. Under normal circumstances, the TSES Employee should have been issued the NPR and allowed to provide an oral and/or written response to the ADAA, the designated Deciding Official. The TSES Employee would have been permitted to make his case as to why a lesser penalty was warranted. He could have provided mitigating evidence, which the ADAA would have been bound to consider. Based on historical precedent, the

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<sup>16</sup> Although the TSES Employee did not receive the NPR until 3:00 p.m. on June 15, 2015, it appears that day was counted as the first day of his 14-day suspension.



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TSES Employee's penalty may well have been reduced to something less than removal had the process been allowed to run the normal course.

Instead, senior leadership appears to have commandeered the process, resulting in decisions by the Agency that raise serious questions about the appropriateness of its actions in this matter, including:

- 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 — 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 UC'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;



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- 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.

The above actions by senior leadership — including DA Hatfield, Chief Counsel Kerner, and AA Book — undermined the purpose and function of OPR, which was created to ensure fair, consistent disciplinary action against TSA senior management who engage in wrongdoing. In fact, OPR was originally established in response to widespread complaints about members of senior management receiving unfairly favorable treatment — the very concern being raised with respect to senior leadership’s handling of the TSES Employee’s disciplinary matter.

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). However, the same argument could be made of any employee under OPR review. 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.

Second, according to Kerner, the TSES Employee was scheduled to testify before Congress on behalf of TSA [REDACTED]. Both Kerner and AA Book were concerned about the TSES Employee representing the



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Agency before Congress if the Agency was considering his removal for lack of candor. According to Kerner, she felt that resolving the situation with the TSES Employee via a settlement would bring an expeditious end to the matter and ensure he did not testify. DHS OIG does not find this justification compelling. Allowing OPR's process to run its normal course would not have required that the TSES Employee be permitted to testify, nor would it have diminished the Agency's ability to keep the TSES Employee from testifying. In light of the proposed removal reflected in the NPR issued to the TSES Employee, the Agency could have instructed the TSES Employee to withdraw from the congressional testimony, which it did in any event. There is simply no reason why the circumstances necessitated immediate resolution via a rushed settlement.

Finally, Kerner raised broader concerns about the structure and operations of OOI and OPR generally. For instance, Kerner faulted OOI with failing to adequately develop mitigating factors. 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.

DHS OIG does not find these justifications compelling. As a practical matter, consistent with its statutory authority, TSA's senior leadership may create, revisit, revise, and/or discontinue any TSA policy, procedure, practice, or program. However, operating 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. Further, it subjects the Agency to litigation risk from employees who would claim their less favorable treatment evidences discrimination and/or retaliation. And it erodes the trust of the TSA workforce, Congress, and the public in the Agency. If TSA's senior leaders had legitimate concerns about existing disciplinary policies and procedures, they should have addressed those concerns through changes



## OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

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from which all TSA employees could benefit, not just the TSES Employee.<sup>17</sup>

### III. Conclusion

DHS OIG's review of TSA's handling of the TSES Employee's disciplinary matter uncovered significant deviations from policy and standard practice indicating that the TSES Employee received unusually favorable treatment. TSA should address these irregularities with the involved employees who still remain at TSA, and should take steps to advise TSA employees of all levels and positions of their obligation to comply with existing policies and standard procedures for all disciplinary matters, including matters involving members of the TSES. By so doing, TSA will be better positioned to accomplish its stated aim of "ensuring that the disciplinary process treats all TSA employees the same regardless of title or position."<sup>18</sup>

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<sup>17</sup> While DHS OIG's investigation was ongoing, TSA began weighing options for modifying OPR's structure and standard procedure to address some of these concerns, including finding an appropriate and transparent way to include senior leadership in the adjudication of disciplinary matters involving members of the TSES. Among other things, TSA is reportedly considering having a supervisor in the subject's chain of command serve as the Deciding Official, rather than the OPR Assistant Administrator or Deputy Assistant Administrator.

<sup>18</sup> Halinski Action Memo.

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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MINORITY (202) 225-5051

<http://oversight.house.gov>

April 26, 2016

The Honorable Peter V. Neffenger  
Administrator  
Transportation Security Administration  
601 12th Street, South  
Arlington, VA 20598

Dear Administrator Neffenger:

We are writing to request information regarding (1) the process by which [REDACTED] currently the [REDACTED] in the Office of Security Operations (OSO), was disciplined in 2015 for misconduct, and (2) the process by which his security clearance was reviewed after this discipline was imposed. [REDACTED]

**Concerns About [REDACTED] Settlement Agreement**

On June 15, 2015, [REDACTED] of TSA's Office of Professional Responsibility (OPR) issued a Notice of Proposed Removal (NPR) recommending that [REDACTED] then [REDACTED] in the Office of Intelligence and Analysis (OIA), be terminated from his employment at TSA. This recommendation was based on the findings of a Report of Investigation (ROI) issued by TSA's Office of Inspections (OOI) on April 7, 2015. The NPR found [REDACTED]

Specifically, [REDACTED] found [REDACTED]

[REDACTED]

<sup>1</sup> Notice of Proposed Removal from [REDACTED] Unit Chief, Office of Professional Responsibility, Transportation Security Administration, to [REDACTED] Assistant Administrator, Office of Intelligence Analysis, Transportation Security Administration (June 15, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On April 15, 2016, Committee staff conducted a transcribed interview with [REDACTED] during which he explained that an “hour or less” after receiving this Notice of Proposed Removal on June 15, 2015, TSA officials presented him with a proposed settlement agreement that significantly reduced his disciplinary penalty.<sup>10</sup>

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<sup>4</sup> Transportation Security Administration, *Report of Investigation, Case Number: 1150026* (Apr. 7, 2015), at Attachment 2.

<sup>5</sup> Notice of Proposed Removal from [REDACTED] Unit Chief, Office of Professional Responsibility, Transportation Security Administration, to [REDACTED] Assistant Administrator, Office of Intelligence Analysis, Transportation Security Administration (June 15, 2015).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of [REDACTED] Tr. at 255 (Apr. 15, 2016).



Under Executive Order 12986, only individuals who exhibit “strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion” shall be granted access to classified information.<sup>14</sup>

When General Taylor briefed Committee staff on April 21, 2016, he stated that he assumed a review of [REDACTED] fitness to hold a security clearance would be conducted because it was a standard practice whenever disciplinary action was taken, but he had no knowledge of whether such a review happened in [REDACTED] case.<sup>15</sup>

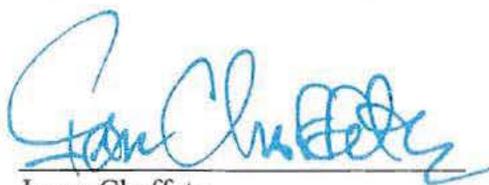
In this case, the NPR issued on April 7, 2015, found [REDACTED] and this conclusion should have caused TSA officials to request a review of [REDACTED] security clearance. Yet, today [REDACTED] continues to hold the position of [REDACTED] within the Office of Security Operations, and he appears to continue to hold his security clearance.

### Conclusion

In light of this information, we request that you provide information to the Committee as soon as possible regarding the process by which the recommendation for [REDACTED] termination was overruled and replaced with a much less severe penalty in less than one hour. We are also making a request of the Department of Homeland Security Inspector General to investigate the process by which [REDACTED] security clearance was reviewed following the ROI, and whether it was conducted under the proper procedures.

If you have any questions about this request, please contact Michael Ding of Chairman Chaffetz’ staff at (202) 225-5074 or Lucinda Lessley with Ranking Member Cummings’ staff at (202) 225-5501. Thank you for your cooperation with this matter.

Sincerely,



Jason Chaffetz  
Chairman



Elijah E. Cummings  
Ranking Member

cc: The Honorable John Roth, Inspector General  
Department of Homeland Security

<sup>14</sup> Exec. Order No. 12968, 60 FR 40245 (Aug. 7, 1995).

<sup>15</sup> Briefing by General Francis X. Taylor, Under Secretary for Intelligence and Analysis, Department of Homeland Security, to House Government Reform Committee (Apr. 21, 2016).

U.S. Department of Homeland Security  
601 South 12th Street  
Arlington, VA 20598

APR 28 2016



Transportation  
Security  
Administration

MEMORANDUM FOR: John Roth  
Inspector General  
U.S. Department of Homeland Security

FROM: Peter V. Neffenger  
Administrator  
Transportation Security Administration

SUBJECT: Request for Review of Case Disposition Process and Determinations

A handwritten signature in blue ink, followed by the date "4/28/16" written in blue ink.

As we discussed in our telephone conversation on April 27, 2016, I am requesting that your office conduct a formal review of the process employed and the determinations reached in the discipline of substantiated misconduct on the part of [REDACTED]. The matters disposed of stem from a Report of Investigation completed by TSA's Office of Inspection in 2015. The TSA Office of Professional Responsibility case file is [REDACTED] which we will provide to you.

My intent is to ensure the propriety of our policy and to ensure appropriate case dispositions in this specific case as well as in cases involving executive-level personnel. I look forward to your findings and recommendations.

Thank you for your assistance. Please feel free to contact me if you have any questions.

## **Additional Information and Copies**

To view this and any of our other reports, please visit our website at:  
[www.oig.dhs.gov](http://www.oig.dhs.gov).

For further information or questions, please contact Office of Inspector General  
Public Affairs at: [DHS-OIG.OfficePublicAffairs@oig.dhs.gov](mailto:DHS-OIG.OfficePublicAffairs@oig.dhs.gov).  
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Department of Homeland Security  
Office of Inspector General, Mail Stop 0305  
Attention: Hotline  
245 Murray Drive, SW  
Washington, DC 20528-0305