



To enhance mission performance, TSA is committed to promoting a culture founded on its values of Integrity, Innovation and Team Spirit.

NOTE: Pursuant to Section 101 of the Aviation and Transportation Security Act (49 U.S.C. 114(n)), this directive and all related Handbooks, Attachments, and Appendices establish Transportation Security Administration (TSA) policy and supersedes Federal Aviation Administration (FAA) orders, policies, guidance, bulletins regarding disciplinary appeal policy and procedures that would apply to Transportation Security Officer (TSO) (Screener) positions issued under the FAA personnel management system. This directive is TSA policy and must be applied accordingly.

REVISION: This revised directive supersedes TSA MD 1100.77-1, *Disciplinary Review Board*, dated February 4, 2004.

SUMMARY OF CHANGES: Section 4, Definitions, adds definitions; Section 7, Procedures, includes clarification of current Board procedures; and the overall format has been revised to be compliant with current agency standards.

1. **PURPOSE:** This directive provides TSA policy and procedures for impartial Board review of appeals of specified adverse actions taken against Transportation Security Officers (TSOs).
2. **SCOPE:** This directive applies to all TSOs in permanent positions who are not serving a TSA trial period, and TSOs in temporary positions who have completed two years or more of current continuous service in a time-limited appointment of more than two years. Refer to TSA MD 1100.31-1, *Trial Periods*, for additional information.
3. **AUTHORITIES:**
 - A. The Aviation and Transportation Security Act, Pub. L. 107-71 (ATSA)
 - B. Homeland Security Act of 2002 Sections 403(2) and 423, 6 U.S.C. 101
4. **DEFINITIONS:** For additional definitions, please refer to TSA MD 1100.77-1 Handbook, *Disciplinary Review Board*.
 - A. Adverse Action: An official action consisting of a suspension of any length, including an indefinite suspension, an involuntary demotion for performance/conduct, or a removal.
 - B. Appellant: A TSA employee within the scope of this directive appealing an adverse action to the Board.
 - C. Day: Calendar day.
 - D. Disciplinary Review Board (DRB): Also referred to as "Board," an impartial body within the Office of Human Capital (OHC) that reviews and decides appeals by TSOs of specified adverse employment actions against TSOs.
 - E. Equal Employment Opportunity (EEO) Complaint: For purposes of this directive, a formal or informal complaint of discrimination as defined in 29 CFR §1614. These complaints

specifically allege discrimination based upon race, color, religion, sex, national origin, age, disability or retaliation.

- F. Management Official: Any TSA employee who is a higher-level official in the employee's chain of supervision such as a supervisor or manager (e.g., Office Director, (OD), Assistant Administrator (AA), Federal Security Director (FSD), Special Agent In-Charge, etc).
- G. Subject Matter Expert (SME): An individual possessing specialized knowledge or expertise selected to assist the Board in analyzing the facts of an appeal. SMEs include, but are not limited to, TSA experts on workers' compensation, suitability, and drug and alcohol testing.
- H. Transportation Security Officer (TSO): This title is used in this directive to include all positions within the 1802 occupational series: TSO, Lead TSO (LTSO), Supervisory TSO (STSO), Master TSO (MTSO) and Expert TSO (ETSO). All MTSO and ETSO positions are included: Behavior Detection Officers, Coordination Center Officers, and Security Training Instructors.

5. RESPONSIBILITIES:

- A. The TSA Administrator or designee is responsible for appointing the Administrative Appeals and Review Officer (AARO) and Board members.
- B. The AARO is the Board Chair and is responsible for the Board's management and operations, including:
 - (1) Promulgating guidance and rules to implement this directive;
 - (2) Forwarding to the Administrator, with his or her recommendations, the names of all eligible TSA employees nominated for Board membership. The nominees shall be K-band (or above) with satisfactory performance ratings and no disciplinary actions within the last two years;
 - (3) Proposing and implementing rules for the conduct of the Board in accordance with this directive;
 - (4) Convening Board panels as needed;
 - (5) Presiding over all Board meetings;
 - (6) Appointing other fact-finders as necessary to resolve appeals;
 - (7) Ensuring Board decisions are made in accordance with all applicable laws, regulations and policies;
 - (8) Issuing written Board decisions; and
 - (9) Ensuring that the Board Opinion and Decision in each appeal accurately reflects the Board's intent.

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- C. The Assistant Administrator for the Office of Security Operations (AA/OSO) or designee is responsible for nominating and forwarding to the Board Chair the names of OSO employees eligible to serve as Board members.
- D. The Assistant Administrator for Human Capital (AA/OHC) or designee is responsible for nominating and forwarding to the Chair the names of Office of Human Capital (OHC) employees eligible to serve as Board members.
- E. The Board members are responsible for considering procedural issues and deciding each appeal on its individual merits in accordance with TSA policies, as applicable.
- F. OHC is responsible for assigning an Employee Relations Specialist to provide technical and administrative support to the Board, and for providing documents requested by the Board.
- G. The Office of Chief Counsel (OCC) is responsible for providing legal advice to the Board. An OCC attorney will provide advice, as needed, during Board panel meetings and will review Board opinions to ensure they are legally sufficient and not contrary to law or TSA policy.
- H. The Office of the Special Counselor (OSC), Office of Civil Rights and Liberties, is responsible for advising the Board as to whether an appellant has an Equal Employment Opportunity (EEO) complaint raising the same or similar issues as those raised in actions appealed to the Board.
- I. Management officials are responsible for complying with the procedures set forth in this directive and accompanying handbook and for providing timely responses to the Board's request for documents and other information as requested.
- J. Appellants and their representatives, if applicable, are responsible for complying with the procedures of this directive and accompanying handbook.

6. POLICY:

- A. Operation. The Board operates as an impartial body within TSA. Its function is separate and distinct from the administrative disciplinary process.
- B. Jurisdiction.
 - (1) The Board is authorized to review appeals of the following specified adverse actions:
 - (a) Suspension of more than 14 days;
 - (b) Indefinite suspension;
 - (c) Involuntary demotion for performance/conduct;
 - (d) Furlough of any length for more information see TSA MD 1100.63-2, *Furlough (Agency Placement of Employees in Nonpay, Nonduty Status)*;

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- (e) Other actions, as directed by the TSA Administrator or designee;
- (f) Removals under the provisions of TSA MD 1100.75-3, Addressing Unacceptable Performance and Conduct; or
- (g) Removals under the following procedures:
 - (i) Involuntary Workforce Reductions in accordance with HCM 351-2, TSO Involuntary Workforce Reduction Procedures; or
 - (ii) Uniformed Services Employment and Reemployment (USERRA) removals under the provisions of TSA MD 1100.30-17, Uniformed Services Employment and Reemployment.

(2) Appeals in which the appellant raises the same matter in a formal EEO complaint or in a whistleblower retaliation complaint to OSC (see TSA MD 1100.75-5, Whistleblower Protections for Transportation Security Officers) will not be heard or decided by the Board, as the appellant elected a forum outside of the DRB process. Appellants must choose the appropriate forum for their allegations. If the appellant elects to proceed before the Board, the Board will not address allegations of statutorily prohibited discrimination, retaliation or whistleblower retaliation.

C. Board Panels. Board panels convened to hear and decide appeals shall be composed of three voting members: the Board Chair and one member each from OSO and OHC.

- (1) Panel: Three voting members of a panel are required for a quorum, one of whom must be the Chair.
- (2) Voting: Appeals are decided by majority vote. The decision date and votes will be recorded in the case file.
- (3) Other Attendees: In addition to voting members, Board panels may be attended by DRB program staff members, the assigned Employee Relations Specialist, the legal advisor, invited subject matter experts, and invited observers.

D. Impartiality of Board Members. Each Board member will act impartially when deciding appeals.

- (1) No one in attendance at a Board panel may disclose the vote or opinion of any particular Board member.
- (2) No one may attempt to influence the vote or opinion of a Board member in any matter before the Board, except by written submissions in accordance with this directive, or by persuasion during discussion at the Board panel, based upon evidence or other matters properly before the Board.

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- (3) No member may be in the same direct chain of supervision of another member for any vote on any appeal at a Board panel.
- (4) No Board member's performance evaluation, pay, or consideration for awards may be based in whole or in part on the member's vote or opinion as a Board member.

E. Standard of Proof and Burden of Proof.

- (1) In proceedings before the Board, the party with the burden of proof must prove essential facts by a "preponderance" of the evidence. A "preponderance" simply means more likely true than not.
- (2) The Board may take notice of matters not subject to reasonable dispute, including matters of common knowledge and matters that can be readily verified.
- (3) In an appeal before the Board, the burden of proof rests initially with management. Management must prove the charge(s) against the appellant by a preponderance of evidence.
- (4) If evidence establishes management's charge(s), then the burden of proof shifts to the appellant to show that the penalty was, under the circumstances, unreasonably harsh.

F. Matters Reviewed. The Board will conduct a complete review of all appealed actions; it will evaluate the evidence and review the procedural and substantive issues, as appropriate.

- (1) The Board will examine each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3. The Board panel will review and consider procedural errors when deliberating the appeal.
- (2) The Board reviews the charge(s) and specification(s) on which the management decision was based to determine if they are established by a preponderance of the evidence. If the charge(s) and specification(s) are established by the evidence, the Board will review the action taken by management officials to see if it was within management's discretion and not unreasonably harsh under the circumstances.
- (3) If the DRB determines that additional information is required to fairly decide an appeal, the Board may direct supplemental fact-finding. Refer to Section K, *Supplemental Fact Finding*, in the *TSA MD 1100.77-1 Handbook, Disciplinary Review Board*.

G. Right to Representation. Under the provisions of TSA MD 1100.63-3, *Employee Representation*, an appellant has a right to have a representative of his or her choosing to assist in preparing and presenting an appeal to the Board. Any representative must be designated in writing, signed personally by the appellant. Management may disallow the representative for the reasons set forth in TSA MD 1100.63-3.

H. Costs and Expenses. All appeal expenses, including any attorney's fees, travel expenses, costs, etc. are the appellant's sole responsibility.

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- I. **Decisions.** The Board's decisions are final. The Board has the authority to sustain, mitigate, or overturn management actions. This includes reducing an action to a lesser penalty that would not itself invoke Board jurisdiction. The Board also has the authority to order back pay and other remedial action as it deems necessary, in accordance with TSA MD 1100.55-10, *Back Pay*. The Board will issue a written decision for each appeal.
 - J. **Orders.** The Board may issue orders dismissing appeals for lack of jurisdiction or untimeliness and the Board may issue other orders necessary to arrive at or implement its decision.
 - K. **Request for Reconsideration of a Decision.** A timely request for reconsideration from the appellant or management will be considered by the Chair or the Board, in its discretion.
7. **PROCEDURES:** See TSA MD 1100.77-1 Handbook, *Disciplinary Review Board*.
8. **EFFECTIVE DATE AND IMPLEMENTATION:** This policy is effective immediately upon signature.

APPROVAL

Signed

4/6/2010

Richard A. Whitford
Assistant Administrator for Human Capital

Date

Distribution: Assistant Secretary, Deputy Assistant Secretary, Assistant Administrators, Office Directors, Area Directors, Federal Security Directors, Administrative Officers, and TSA Affiliated HR Offices.

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