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FIRST LINE DEFENDERS AS SECOND CLASS CITIZENS: COLLECTIVE BARGAINING RIGHTS FOR TSA EMPLOYEES AND NATIONAL SECURITY MAKE GOOD BEDFELLOWS

MARK D. ROTH & JAMISON F. GRELLA*

I. INTRODUCTION

With little pomp and even less circumstance, Transportation Security Agency (TSA) Under-Secretary Admiral James Loy issued a one-paragraph memorandum on January 8, 2003, declaring that Transportation Security Officers (TSOs) had no right to have an exclusive bargaining representative negotiate on their behalf in the interest of national security.¹ Specifically, Under-Secretary Loy stated:

By virtue of the authority vested in the Under Secretary of Transportation for the Security in Section 111(d) of the Aviation and Transportation Security Act . . . I hereby determine that individuals carrying out the security screening function . . . [for the TSA], in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any

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While all the authors are employed by the American Federation of Government Employees (AFGE), a union representing 600,000 federal civilian employees, the views in this article are those of the authors, and not necessarily those of the AFGE or its membership.

1 See generally Mark D. Roth et al., *Job Security and Bargaining Rights of Federal Government Employees*, 8 UDC/DCSL L. REV. 153 (2004) (detailing the contentious nature of labor-management relations during the George W. Bush Administration that existed before September 11, 2001, and led to the passage of the ATSA).

representative or organization.²

However, Loy's assertion that bargaining rights for TSOs will compromise national security was and remains meritless; in fact, quite the opposite is true. Given the current pitiful state of employee-management relations at the TSA, collective bargaining rights will dramatically improve national security. To help elicit this much needed change in the way the TSA does business, the American Federation of Government Employees, American Federation of Labor – Congress of Industrial Organizations (AFGE, AFL-CIO) filed a petition with the Federal Labor Relations Authority (FLRA) to grant over 40,000 TSOs the opportunity to elect a certified bargaining representative.³ Unfortunately, since the failed bombing of Northwest/Delta Airlines Flight 253 on December 25, 2009, Senator James “Jim” DeMint (R-SC) has reignited the false idol of national security angst to attempt to slow down the granting of TSOs collective bargaining rights.⁴

This Article will argue that collective bargaining rights for TSOs will be a boon to national security interests at the TSA. Part II of this Article will place the current lack of bargaining rights for TSA employees in the proper historical and statutory context.⁵ Part III will demonstrate that, given the current statutory scheme, the argument against collective bargaining rights in the interest of national security is a shallow and shameful argument fueled by anti-union political forces capitalizing on public unease in the post-September 11th era.⁶ Part IV will argue that granting collective bargaining rights to TSOs will greatly benefit the TSA's mission of increasing aviation security.⁷ Part V will conclude that any attempts to prevent TSOs from obtaining a collective bargaining representative is contrary to the interests of national security and the mission of the TSA to secure American commercial airspace.⁸

II. CREATION AND HISTORY OF THE TSA

In 2001, Congress called for the federalization of airport security screeners in the interest of national security and the creation of the Transportation Security Authority to fulfill this mission.⁹ As a condition of signing the Aviation and Transportation Security Act (ATSA), the Bush Administration

2 Am. Fed'n. of Gov't Employees AFL-CIO, 59 F.L.R.A. 423, at 2 (2003) (quoting Admiral Loy's January 8, 2003 memorandum regarding the collective bargaining rights of TSA security screeners).

3 See Press Release, Am. Fed'n of Gov't Employees, *AFGE: It's Time For An Election at TSA*, Feb. 22, 2010, <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=1110> (detailing the culmination of eight years of effort by AFGE).

4 See Brett Snyder, *TSA's Poor Handling of Northwest 253 Shows Need for Leadership*, BNET.COM, Dec. 29, 2009, <http://industry.bnet.com/travel/10004490/tsas-poor-handling-of-northwest-253-shows-need-for-leadership> (arguing that DeMint's anti-union agenda is unacceptable given the dire need for leadership at the TSA).

5 See *infra* Part II (detailing the statutory context in which Loy declared that TSOs could not have bargaining rights).

6 See *infra* Part III (demonstrating that FSLMRS already assures appropriate safeguards for national security without prohibiting TSOs from collectively bargaining).

7 See *infra* Part IV (arguing that a collective bargaining agreement in place for TSOs will enable the TSA to better fulfill its mission).

8 See *infra* Part V (concluding that opponents of collective bargaining rights for TSOs are using national security to further an unrelated, anti-union agenda).

9 Aviation and Transportation Security Act, Pub. L. No. 107–71, 115 Stat. 597 (2001) (codified as amended in the scattered sections of 49 U.S.C.).

required Congress to create “flexibility” in human relations management.¹⁰ In terms of administering this mission, the TSA was mandated by statute to comply with the Federal Aviation Authority’s (FAA) system of personnel management.¹¹ However, in a statutory note to the ATSA in § 111(d), the TSA Administrator is empowered to, “[n]otwithstanding any other provision of law . . . employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for airport screeners and establish levels of compensation and other benefits for individuals so employed.”¹²

Relying upon § 111(d), TSA Administrator Admiral Loy declared the TSOs exempt from virtually all rights bestowed to federal employees by virtue of the Federal Service Labor Management Relations Statute (FSLMRS) in the name of national security.¹³ Thus, the Administrator was given unlimited discretion over the personnel management of the security-screening workforce.¹⁴ Pursuant to the FSLMRS, the FLRA is afforded sole jurisdiction for determining the composition of appropriate bargaining units for federal agencies.¹⁵ In 2003, the FLRA upheld Admiral Loy’s January 8, 2003, memorandum that stated TSOs were precluded from bargaining collectively through an exclusive representative in the interest of national security.¹⁶ Then-member Carol Waller Pope (now the current Chairperson of the FLRA) offered a scathing dissent to the majority’s conclusion, stating that:

The majority does not explain why it interprets [§ 111(d)] to permit the [TSA] head to eliminate employees’ right to organize under the [ATSA]. Moreover, even a casual reading of [§ 111(d)] demonstrates that it relates to the determinations of employee working conditions hiring, appointment, discipline, and compensation – not a determination whether the employees are permitted to organize under the [ATSA]. Although that provision may grant [TSA] discretion over the subjects contained in it, it does not grant discretion to add subjects that Congress left out. That is what the majority does here.¹⁷

Though TSOs have been barred from having a collective bargaining representative, TSOs are

10 See, e.g., 49 U.S.C. § 44935 (2006) (granting the TSA Administrator expansive powers over the TSA workforce). See also, Alex C. Hallet, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners*, 72 GEO. WASH. L. REV. 834, 842 (2004) (concluding that inconsistent language regarding collective bargaining rights under § 44935 retained in the final version of the ATSA adds credence to the broad management rights provisions).

11 See Roth, et al., *supra* note 2, at 170–71 (describing how inclusion of this language at 49 U.S.C. § 114(n) explicitly but indirectly incorporates collective bargaining rights from the FSLMRS into the ATSA).

12 § 111(d) (codified as amended at 49 U.S.C. § 44935 Note (2006)).

13 See Am. Fed’n. of Gov’t Employees, AFL-CIO, 59 F.L.R.A. 423, at 2 (2003) (quoting Admiral Loy’s January 8, 2003 memorandum).

14 See, e.g., *Dep’t of Homeland Sec. Border and Transp. Directorate Transp. Sec. Agency*, 59 F.L.R.A. 423 (demonstrating that both courts and administrative agencies have understood §114(n) to apply to the non-screener workforce of the TSA and the statutory note to apply to the majority of the TSA workers: TSOs)

15 See Am. Fed’n. of Gov’t Employees AFL-CIO v. Loy, 281 F. Supp. 2d 59, 63, n.9 (D.D.C. 2003), *aff’d*, Am. Fed’n. of Gov’t Employees v. Loy, 367 F.3d 932 (D.C. Cir. 2004) (ruling that in light of 5 U.S.C. § 7111(b)(1)(a) grants the FLRA the exclusive jurisdiction to determine bargaining in the federal sector).

16 See Am. Fed’n. of Gov’t Employees, AFL-CIO, 59 F.L.R.A. at 12–13 (noting that only the TSA Administrator may decide whether to afford TSOs collective bargaining rights).

17 *Id.* at 15.

permitted to join a union under the First Amendment even if that union cannot bargain collectively on their behalf.¹⁸ Unions such as AFGE, though barred from serving as the collective bargaining representative for TSOs, have engaged in providing legal aid, representation, and informational clinics to TSOs who have joined.¹⁹ Though AFGE has made important gains in improving the low morale and high attrition among the TSOs, without a collective bargaining agreement there is a limit to how much AFGE can do.²⁰

During his presidential campaign in 2008, President Barak Obama, in a letter to AFGE National President John Gage, promised that if elected he would reverse the Bush Administration's position withholding collective bargaining rights from TSA employees and would "work to ensure that TSOs have collective bargaining rights and a voice at work to address issues that arise locally and nationally."²¹ President Obama found a nominee with the credentials and drive to head the TSA; Erroll Southers, a former FBI agent and homeland security specialist, managed to make it through two Senate committees with bipartisan support for his appointment.²² However, in December 2009, Senator DeMint threatened to filibuster Southers' appointment due in part to DeMint's belief that Southers would provide bargaining rights for TSOs.²³ Ultimately, Southers withdrew his nomination thereby leaving the TSA without an Administrator.²⁴ Shortly thereafter, on February 22, 2010, AFGE filed a petition for an election of a certified collective bargaining representative with the FLRA for the more than 40,000 TSOs employed by the TSA.²⁵

However, DeMint's initial line-in-the-sand over the issue of collective bargaining rights has continued to cast a pall over the confirmation of a new TSA Administrator and gather supporters. Senator Kay Bailey Hutchinson (R-TX) echoed DeMint's misplaced concerns during the abortive nomination process of Robert Harding in March 2010.²⁶ Finally, on June 25, 2010, President Obama

18 See *Am. Fed'n. of Gov't Employees, Local 1 v. Stone*, 502 F.3d 1027, 1033–34 (9th Cir. 2007) (ruling that the TSA could not interfere with AFGE's attempts to solicit membership).

19 See *id.* at 1033–34 (noting that even if AFGE had been barred from serving as the collective bargaining representative, the union may still represent TSOs in other matters).

20 See Maria L. Ontiveros, *Labor Union Coalition Challenges To Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 1 U. CHI. LEGAL F. 103, 145-146 (2009) (concluding that the open-source form of union representation that AFGE is currently providing to TSOs is requisite to long term social change for low wage workers).

21 Letter from Barack Obama, U.S. Senator, to John Gage, National President, AFGE (on file with author), available at http://en.wikisource.org/wiki/Barack_Obama%27s_Letter_to_John_Gage_regarding_the_Transportation_Security_Administration (last modified Oct. 20, 2008).

22 See Robert O'Harrow Jr. & Ed O'Keefe, *Obama's embattled TSA pick withdraws as opposition mounts; Errors in Southers's testimony prompted skepticism from GOP*, WASH. POST, Jan. 21, 2010, at A4 (reporting that DeMint's stalling tactics had caused other Senators to question Southers' competence, leading to his withdrawal).

23 *Id.*

24 See *id.* (noting that the TSA has been without leaderless since President Obama came into power).

25 See Sam Hananel, *Union Moves to Represent Airport Screeners*, ABCNEWS.COM, Feb. 22, 2010, <http://abcnews.go.com/Business/wireStory?id=9910830> (commenting that a union ordinarily waits until workers have bargaining rights before seeking to represent them).

26 See Joe Davidson, *TSA Pick to Face Questions About Collective-Bargaining Rights During Hearing*, WASHINGTON POST (June 8, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060704514.html>.

found a new Administrator for the TSA, John Pistole, whom the Senate unanimously confirmed.²⁷ During his confirmation hearings, Pistole—probably with opponents like DeMint and Hutchinson in mind—declined to take a stand on the issue of collective bargaining rights for TSOs.²⁸ The decision may ultimately be out of Administrator Pistole’s hands now that the FLRA has granted a review of AFGE’s February 2010 petition for election.²⁹

III. COLLECTIVE BARGAINING FOR TSOs DOES NOT THREATEN NATIONAL SECURITY

Recently, the most vehement, if not sole, opposition to collective bargaining rights at the TSA is from Senator DeMint.³⁰ Senator DeMint has framed the argument that the interests of national security are incompatible with the collective bargaining rights of the 40,000 TSOs.³¹ This argument fails upon closer examination because there is no rational relation, historically or otherwise, between the right to bargain collectively and the right of the American people to know that their air-travel is secure. The statutory scheme of the FSLMRS, the presence of collective bargaining rights in other agencies that support national security, and the performance of many unionized federal workers during national emergencies demonstrate that there currently is a proper balance in place between the TSA’s (or DHS’s or DOD’s or DOJ’s) ability to perform its statutorily assigned duties and the right of the rank-and-file security screeners to exercise the federal sector bargaining rights enumerated in the FSLMRS.

The opposition’s central argument against collective bargaining rights for TSOs is that bargaining rights and an agreement would force the TSA to consult and negotiate with the union over every issue that might arise, thus limiting its ability to adapt to the security needs of the nation’s airports.³² In essence, this argument is that the presence of an exclusive bargaining representative would tie the TSA’s hands in its day-to-day activities. However, this argument incorrectly ignores the reality of the collective bargaining paradigm in the federal sector pursuant to granting significant management rights in the FSLMRS.³³ Essentially, any bargaining with the federal government over areas listed within § 7106 is limited to effects rather than decision bargaining.³⁴ By way of illustration, a

27 See Joe Davidson, *John Pistole Becomes TSA Administrator; Unions to Seek Collective-Bargaining*, WASHINGTON POST (June 26, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/25/AR2010062504490.html>.

28 See *id.*

29 See Press Release, Am. Fed’n of Gov’t Employees, *FLRA Agrees With AFGE That Review is Necessary in TSA Petition*, July 30, 2010, available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=1195>.

30 See Margaret Talev, *Who’s Running the TSA? No one, thanks to Sen. Jim DeMint*, MCCLATCHY NEWSPAPERS, DEC. 28, 2009, <http://www.mcclatchydc.com/2009/12/28/81356/whos-running-the-tsa-no-one-thanks.html> (highlighting Senator DeMint’s lead role in holding back President Obama’s nomination for TSA administrator).

31 *Id.* (stating that unionizing the TSA would place the interests of organized labor above the interests of American travelers).

32 *Id.* (arguing that collective bargaining would impair the flexibility the TSA has to make real-time decisions to prevent attempted attacks).

33 See 5 U.S.C. § 7106 (2006) (delineating numerous areas in which management retains the right to set the terms and conditions of employment).

34 See § 7106(a)(2)(D) (stating that nothing in § 7106 shall affect the authority or ability of the TSA “to take whatever actions” to ensure that the agency continues functioning properly during an emergency).

bargaining representative could negotiate over the effect of an employee's temporary transfer or file a grievance after the fact, but could not challenge the underlying decision at the time the temporary transfer is made.³⁵ Therefore, collective bargaining would help the TSA in its day-to-day activities because it would put screeners—acutely aware of what needs to happen and what needs to happen well on a day-to-day level—at the table to strengthen the negotiable procedures and practices, or the impact and implementation of management rights, in a way that is not present today. Furthermore, it would give TSOs a neutral arbitrator to challenge the TSA when it fails to follow its own rules on a day-to-day basis. The claim that collective bargaining rights would give unions the power “to veto or delay future security improvements at our airports”³⁶ is woefully ignorant of the statutory scheme created by the FSLMRS to govern labor relations between the federal government, unions, and employees.

One item that is expressly removed from any bargaining table with the TSA is any bargaining over the decision to implement security procedures or practices. All federal agencies are empowered to suspend collective bargaining agreements in the presence of a national emergency under § 7106(a)(2)(D) which states that “nothing . . . shall affect the authority of any management official of any agency . . . to take whatever actions may be necessary to carry out the agency mission during emergencies.”³⁷ Interestingly, during and after the attacks of September 11, 2001, no federal agency made any effort to suspend any collective bargaining agreement in place with the federal government—including the Department of Defense. Finally, there is an absolute prohibition on labor strikes against the federal government as an employer.³⁸ In fact, many of the first responders to the September 11th attacks were union members—firefighters, police officers, FEMA personnel, and construction workers—who performed their jobs first without consulting either a union steward or a collective bargaining agreement.³⁹ Considered in the appropriate statutory context, this raises the troubling questions about what, if any, negative effect on national security negotiating meal and break time provisions in a collective bargaining agreement could have on national security. The answer appears to be that Senator DeMint and others are using national security as a straw dog simply to push forward an anti-union agenda at the expense of leaving the TSA without an Administrator. Thus the Agency tasked with implementing policies essential for aviation security has been prevented from filling its top leadership position so essential to its mission functioning.

Several other federal agencies, including some other Department of Homeland Security compo-

35 See, e.g., *Nat'l Treasury Employees Union*, 39 FLRA 27, 51 (1991) (noting that § 7106(a)(2)(A) gives management the right to decide which employee will be assigned to a particular position).

36 See Talev, *supra* note 27 (highlighting Senator DeMint's insistence that the Obama Administration rethink their support for the unionization of TSOs).

37 § 7106(a)(2)(D).

38 See § 7116(b)(7) (making the calling of or participation in a strike or stoppage of work an unfair labor practice against the federal government); see also 49 U.S.C. § 44935(i) (2006) (reiterating the no-strike prohibition from the FSLMRS into the ATSA).

39 See Charles A. Hobbie, *The U.S. Government's Attacks on the Collective Bargaining Rights of Federal Employees*, UNIONBLOG.COM, May 25, 2004, <http://www.afge.org/Index.cfm?Page=UnionBlog&FuseAction=View&BlogID=47&Type=U> (asserting that the right of government employees to be represented by a union and engage in collective bargaining has never been proven to be a threat of any kind to national security).

nents, like the TSA, currently have collective bargaining agreements in place. Additionally, the Department of Defense, the Bureau of Prisons, and the Civilian Branch of the Coast Guard have had collective bargaining rights since the 1960's and continue to have collective bargaining agreements in place with their employees. Under the statutory provisions of the FSLMRS, only the Federal Bureau of Investigation, the Central Intelligence Agency, and the Secret Service have been exempted from collective bargaining on grounds of national security.⁴⁰

IV. COLLECTIVE BARGAINING FOR TSOs WOULD, IF ANYTHING, ENHANCE NATIONAL SECURITY

In almost seventy years of history since the passage of the National Labor Relations Act (NLRA), private sector, statutorily-protected collective bargaining rights have never been found incompatible with national security.⁴¹ In *Firstline Transportation Security*, the National Labor Relations Board (NLRB) asserted jurisdiction over the privatized security screeners at Kansas City International Airport.⁴² The NLRB noted that collective bargaining rights and national security are not mutually exclusive ends; “[u]nionism and collective bargaining are capable of adjustments to accommodate the special functions of security screeners, and the regulations set forth in the ATSA already limit the collective bargaining rights of security screeners.”⁴³ Though the NLRB did not discuss the merits of Admiral Loy’s memorandum withholding collective bargaining rights for federally employed screeners, the NLRB refused to extend Loy’s rationale to their private-sector counterparts on the grounds of national security.⁴⁴ In doing so, the NLRB surveyed almost seventy years of precedent and found that it had never once denied the protections of the NLRA to employees on grounds of national security.⁴⁵ The NLRB also indicated that, in its expert opinion, it did not see collective

40 See 5 U.S.C. § 7112(b)(6) (2006) (“A [collective bargaining] unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes . . . any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security); see also § 7103(a)(3) (exempting several agencies from the provisions of the FSLMRS).

41 See *Firstline Transp. Sec.*, 347 N.L.R.B. 447, 448 (2006) [hereinafter *Firstline*]. Though promulgated to enhance national security and secure American commercial aviation, the ATSA left five airports with private screeners as part of a pilot program and, beginning in November 19, 2004, gave additional airports the ability to opt-out of using federal screeners by allowing any airport nationwide to contract with a private screening company. *Id.* Currently, twelve additional airports plus the original five, including San Francisco International Airport, which is unionized under the NLRA by Service Employees International Union (SEIU), use privatized security screeners. See TSA Frequently Asked Questions – Program: Screening Partnership Program, http://www.tsa.gov/what_we_do/optout/spp_faqs.shtm (last visited Apr. 5, 2010) (describing employee benefits and other features of the Screening Partnership Program); see also 49 U.S.C. § 44920 (2006) (describing the security screening opt-out provision of ATSA).

42 *Firstline*, 347 N.L.R.B. at 456.

43 *Id.* (finding that, since other airport/airline personnel, like pilots and flight attendants, who have critical security responsibilities have the right to collectively bargain under the Railway Labor Act, any argument about the potential detrimental effects of unionization is speculative).

44 *Id.* at 457 (noting that it would take Congressional action for such a policy to be adopted for private sector security screeners).

45 *Id.* at 454–56 (establishing that the NLRB has not asserted national security or defense as a reason to deny employees their Section 7 rights to organize and bargain collectively).

bargaining and national security as incompatible.⁴⁶

The greatest advantage collective bargaining poses for national security is as a curative measure for many of the employee issues that plague the TSA and distract its personnel and resources from implementing policies to enhance aviation security. Currently, the TSA has the lowest employee morale, substantially higher per capita incidences of EEOC complaints, and one of the highest attrition rates of employees in the entire federal sector.⁴⁷ As Senator John McCain noted in 2001, one of the major problems with airport security that led to the September 11th attacks was high airport security screener attrition.⁴⁸ Nine years later, the problem still exists. A strong union presence with collective bargaining rights will curb TSO attrition rates so that the TSOs serving as the first-line of defense for American commercial aviation have years of experience, rather than months.

A collective bargaining agreement between TSOs and the TSA will produce a static and predictable system for employees to interact with their supervisors and with the agency as a whole, including requesting leave-time and fairer work schedules that can be used to curb TSO attrition. As stated, the TSA currently enjoys higher than average employee attrition when compared with the rest of the federal sector. In 2007, the TSA reported a voluntary attrition rate of 17.4%, a number that is almost the double the average overall federal government rate of 9.7%.⁴⁹ Of the 51,129 active TSOs in 2007, 36% had been employed for less than two years.⁵⁰ With a collective bargaining agreement in place, TSOs will be free to focus entirely on performing their security screening duties while knowing that their union has arranged for other concerns of their employment. Additionally, this will give the TSA the opportunity to create a predictable system to retain TSOs through a neutral arbitration of TSO grievances.⁵¹

In investigating this high attrition rate, TSA Inspector General Richard L. Skinner reported in May 2008 that TSOs suffer from unsatisfactorily low employee morale. Amongst the reasons listed by TSOs for having low moral were:

- Inconsistent interpretation and implementation of TSA policies and procedures, such as operating procedures, leave policies, and overtime requirements
- Concerns with local management, such as lack of trust, fear of retaliation, authoritarian

46 *Id.* at 456 (explaining that union membership and collective bargaining are capable of being molded to fit the special responsibilities of the TSOs while being faithful to national security interests).

47 See Michael Hampton, *Low Morale at TSA leads to Distraction, Attrition*, HOMELANDSTUPIDITY.US, Jul. 1, 2008, <http://www.homelandstupidity.us/2008/07/01/low-morale-at-tsa-leads-to-distraction-attrition/> (last visited Apr. 5, 2010).

48 See 147 Cong. Rec. S10,434 (daily ed. Oct. 10, 2001) (statement of Sen. McCain) (noting that the average attrition at major airports was 125% with some airports experiencing rates as high as 400%, mainly because screeners could “make more money . . . working at a concession at the same airport . . . and . . . [were] ill-trained”).

49 TSA: The Facts of TSO Attrition, <http://www.tsa.gov/approach/people/attrition.shtm> (last visited Apr 5, 2010) (finding that the attrition rate was higher with the TSA due to the nature of the agency, the mental and physical demands of the work, the large amount of part-time workers employed by the agency, and the relative youth and inexperience of the labor force).

50 *Id.* (noting that the average tenure of an active TSO was 3.5 years).

51 See generally Memorandum from the Office of Human Capital, Transp. Sec. Admin., TSA Management Directive No. 1100.77-2, Grievance Procedures (Apr. 5, 2006) (on file with author) (excluding 23 matters from the internal TSA grievance procedure for TSOs).

management style, mistreatment, and disrespect

- Poor communications and information sharing
- Insufficient time to complete all work-related responsibilities, such as training, collateral duties, and Performance Accountability and Standards System documentation
- Favoritism demonstrated through preferential scheduling and unfair promotion practices
- Insufficient staffing at passenger checkpoints.⁵²

As a result of low morale amongst TSOs, the TSA continues to suffer from a significantly higher than average incidence of complaints with the EEOC.⁵³ In 2009, the EEOC heavily admonished the TSA for not understanding even the most basic tenets of the ADA and granted \$150,000 in damages to a TSO and over \$40,000 in attorneys' fees to AFGE (which provided legal representation to the discriminated TSO).⁵⁴ Interestingly, almost all of the concerns that TSOs raised in Inspector General Skinner's 2008 report could be addressed through the collective bargaining process between a certified exclusive representative and the TSA. Ultimately, given the FSLMRS's statutory protections for national security and the TSA's inability to stem the low morale and attrition amongst its security screeners, collective bargaining may be the answer that the beleaguered TSA needs to continue its mission for the good of the American people.

V. Conclusion

Ultimately, the fate of collective bargaining rights for TSOs remains uncertain until TSA Administrator Pistole, the DHS Secretary, the FLRA, or an act of Congress affirmatively grants our first line of defense these rights. On August 4, 2010, President Obama declared to the AFL-CIO's Executive Counsel that the "business community sees labor as the problem."⁵⁵ However, the Obama Administration should hold itself, as employer, to the same standard it wants to hold the private sector. For the sake of national security, it is long past time for President Obama to keep the promises he made to TSOs almost two years ago and grant them the collective bargaining rights necessary for the TSA to successfully complete its mission.

52 Memorandum from Richard L. Skinner, Inspector General, Dep't of Homeland Sec., Transportation Security Administration's Efforts to Proactively Address Employee Concerns, at 3 (May 28, 2008) [hereinafter Skinner] (on file with author).

53 See *id.* at 2 (describing that TSOs have used the EEOC as their venue to protest discrimination).

54 See Press Release, Am. Fed'n of Gov't Employees, *AFGE Wins Unprecedented Damages Award in EEO Case Against TSA* (Apr. 17, 2009), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=985> (describing a complaint in which the TSA discriminated against a TSA employee based on his disability when the agency removed him from his position).

55 *Fruits of His Labor*, POLITICO (Aug. 4, 2010), available at http://www.politico.com/politico44/perm/0810/obama_addresses_aflcio_e3c14028-5019-47fa-9098-899353b21017.html.