

**MEMORANDUM OF AGREEMENT
BETWEEN
TRANSPORTATION SECURITY ADMINISTRATION
AND
U.S. MERIT SYSTEMS PROTECTION BOARD**

1. **PARTIES.** The parties to this Memorandum of Agreement (MOA) are the Transportation Security Administration (TSA) and the U.S. Merit Systems Protection Board (MSPB).
2. **AUTHORITIES.** The Aviation and Transportation Security Act (ATSA), including, but not limited to 49 U.S.C. § 114(m), which grants the TSA Administrator the same authority as the Administrator of the Federal Aviation Administration (FAA) under 49 U.S.C. § 106(l) and (m) to use or accept services, equipment, personnel, and facilities of any other federal agency. Further, under § 114(m), the heads of other federal agencies are authorized to cooperate with TSA in making such services, equipment, personnel, and facilities available to TSA.
3. **DEFINITIONS.**
 - A. **Covered Adverse Actions (CAAs):** (i) adverse actions, as defined in TSA Management Directive (MD) No. 1100.75-3, *Addressing Unacceptable Performance and Conduct*, and its accompanying Handbook; (ii) adverse actions taken in conjunction with an Involuntary Workforce Reduction pursuant to TSA Human Capital Management (HCM) Policy 351-2; and (iii) Furloughs as defined in TSA MD 1100.63-2. Except as provided by this provision, CAAs do not include matters excluded by TSA MD 1100.75-3 and its accompanying Handbook, or any other matter over which MSPB would otherwise have jurisdiction. CAAs may be appealed directly to MSPB pursuant to this MOA or filed with TSA as a mixed case complaint and processed pursuant to 29 C.F.R. § 1614.302. CAAs include only: (1) those effected by TSA on or after the effective date of this MOA; or (2) those for which TSA's mixed case complaint process was exhausted on or after the effective date of this MOA pursuant to 29 C.F.R. § 1614.302(b), (d) and 5 C.F.R. part 1201, subpart E.
 - B. **Transportation Security Officers (TSOs):** personnel employed or appointed to carry out the screening functions of the TSA Administrator under 49 U.S.C. § 44901. This includes TSOs, Lead TSOs, Master TSOs, Expert TSOs, and Supervisory TSOs.
 - C. **Eligible TSOs:** TSOs against whom TSA takes a CAA who are entitled to appeal that action to MSPB under this MOA in the same manner as non-TSO TSA employees as provided by TSA MD 1100.75-3 and its accompanying Handbook. *See* TSA MD 1100.75-3, Handbook, § J(2)(a)-(b).
 - D. **Sensitive Security Information (SSI):** In general, and in accordance with 49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5, SSI is information obtained or developed in the

conduct of security activities, including research and development, the disclosure of which TSA has determined would: (1) constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file); (2) reveal trade secrets or privileged or confidential information obtained from any person; or (3) be detrimental to the security of transportation.

- E. Addendum Appeals: proceedings for Attorney Fees and for Consequential or Compensatory Damages pursuant to 5 C.F.R. part 1201, subpart H; and Petitions for Enforcement pursuant to 5 C.F.R. part 1201, subpart F, related to appeals of CAAs.
- 4. PURPOSE. The purpose of this MOA is to set forth a general framework for MSPB to adjudicate and issue binding decisions for appeals of CAAs filed by TSOs and former TSOs in the same manner as non-TSO TSA employees as provided by TSA MD 1100.75-3 and its accompanying Handbook.
 - 5. EFFECTIVE DATE. This MOA shall be effective beginning on September 26, 2021.
 - 6. RESPONSIBILITIES.
 - A. TSA will comply with all provisions of 5 C.F.R. part 1201.
 - B. MSPB will adjudicate each appeal in the same manner as those adjudicated for non-TSO TSA employees and in accordance with applicable statutes, regulations, policies, and procedures, including, but not limited to, 5 C.F.R. part 1201; relevant precedent of MSPB and the U.S. Court of Appeals for the Federal Circuit; TSA MD 1100.75-3 and its accompanying Handbook; TSA HCM Policy 351-2; TSA MD 1100.63-2; TSA MD 1100.43-3, *Employee Performance Management Program*, and its accompanying Handbook; and TSA MD 1100.43-4, *Transportation Officer Performance System*, and its accompanying Handbook. MSPB will maintain the records for each appeal covered by this MOA in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a, and its Appeals and Case Records system of records governed by MSPB/GOVT-1 (77 Fed. Reg. 65,206). Appeal records maintained in this system may be disclosed by MSPB pursuant to the routine uses listed therein, and appellants requesting access to their records in this system must follow the procedures set forth in MSPB's Privacy Act regulations at 5 C.F.R. part 1205. Additionally, MSPB will retain appeal records in accordance with its records retention schedules approved by the National Archives and Records Administration.
 - C. TSA will implement final MSPB decisions, as defined in 5 C.F.R. § 1201.113 and 5 C.F.R. § 1201.117, issued pursuant to this MOA.
 - D. MSPB will submit to TSA a quarterly billing statement with an itemized report of the number of appeals filed with MSPB pursuant to this MOA and the total dollar amount to be reimbursed to MSPB by TSA. Such amount will be calculated by multiplying the number of appeals filed during that quarter by \$4,536.00. The fixed price per appeal is inclusive of any expenses that may be incurred even if an oral hearing is

conducted except for the cost of court reporting services, estimated at \$440.00 for an eight-hour hearing, and the cost of written transcript services, if any, estimated at \$4.00/page when applicable. MSPB will submit to TSA any such actual costs in a quarterly billing statement after the hearing date(s). For the purposes of this provision, an appeal filed pursuant to this MOA includes appeals of CAAs; addendum appeals, as defined in Section 3.E. above; petitions for review under 5 C.F.R. part 1201, subpart C; and remands of the same, each of which will be reimbursed to MSPB by TSA as separate appeals.

MSPB will submit to TSA a quarterly billing statement with an itemized report of the administrative costs associated with this MOA with a total dollar amount to be reimbursed to MSPB by TSA. The administrative costs will not exceed 2% percent of the fixed price and associated expenses of an appeal.

Within 30 days of the date that TSA receives a billing statement, TSA will pay MSPB via the U.S. Treasury's intra-governmental payment and collection system (IPAC). If there is any disagreement on the amount billed, or need for further documentation to support the amount, TSA will contact MSPB's Point of Contact listed in Section 7 below. Notwithstanding Section 12 below, the issue will be elevated within each agency should any disagreement persist and if the agencies are not able to resolve informally, each agency will use the Treasury Financial Manual dispute resolution process referenced in box 16 of the United States Government General Terms & Conditions (GT&C) FS Form 7600A.

- E. SENSITIVE SECURITY INFORMATION. CAAs for which MSPB review is requested may involve testimony and documents that constitute or contain SSI subject to the protections of 49 C.F.R. part 1520. TSA and MSPB agree to protect SSI in accordance with 49 C.F.R. part 1520 and MSPB policies and procedures for handling SSI, including but not limited to handling SSI breaches, as set forth in the MSPB SSI Directive (May 23, 2011).

7. POINTS OF CONTACT.

- A. For TSA: Michael Gaches, Acting Deputy Chief Counsel (Litigation), Office of the Chief Counsel, 6595 Springfield Center Drive, Springfield, VA 20598.
Phone: 571 227-1874; Fax: 703 822-8989; Email: michael.gaches@tsa.dhs.gov
- B. For MSPB: Laura Alborno, Acting Director of Regional Operations, 1615 M Street, NW, Washington, DC 20419. Phone: 214 767-0555; Fax: 214 767-0102;
Email: Laura.Alborno@mspb.gov

The successors of these individuals shall be treated as equivalent points of contact for all responsibilities associated with this MOA, without the need for any additional modification of or correction to this MOA.

- 8. RIGHTS AND BENEFITS. Nothing in this MOA is intended to diminish or otherwise affect the authority of the parties to this MOA to carry out their statutory, regulatory, or

other official functions, nor is this MOA intended to create any right or benefit, substantive or procedural, enforceable at law by any party to this MOA against the United States, its agencies or officers, state agencies, or officers carrying out programs authorized by federal law, or any other person not otherwise authorized by law or regulation to include Pub. L. 107-71, the “Aviation and Transportation Security Act,” as amended.

9. TERMINATION. Either party may terminate this MOA without cause by giving the other party at least 30 days’ written notice of its intent to terminate. Any appeal filed with MSPB pursuant to this MOA and pending upon the termination of the MOA shall be adjudicated until a final decision is issued and TSA has implemented the final decision pursuant to Section 6.C. above. For the purposes of this provision, an appeal includes appeals of CAAs; addendum appeals, as defined in Section 3.E. above; petitions for review under 5 C.F.R. part 1201, subpart C; and remands of the same. Termination of this MOA does not affect the right of a party to any such appeal pending at the time of termination to file an addendum appeal or petition for review otherwise permitted under this MOA. Notwithstanding the terms of the MOA, in the event that TSOs are granted the right to appeal to the MSPB as a matter of law, the MOA will terminate upon the effective date of such law.
10. SHARED INFORMATION AND/OR DATA. TSA and MSPB agree that this MOA only relates to the information described within and that all information so used will be used for official purposes only. This MOA does not give MSPB, or any other party, access to information maintained by TSA beyond that normally released under the Freedom of Information Act and/or the Privacy Act. MSPB will follow its policies and procedures for safeguarding against and responding to any breach of personally identifiable information.
11. RESOURCES AND FUNDING. While each party will attempt to carry out their responsibilities set out in this MOA in a good faith effort to achieve mutual goals, this MOA does not constitute a legally enforceable obligation by either party to expend funds in furtherance of this MOA, except as set forth in Section 6.D. above. Funding requirements necessary for this MOA, to include specific information about period of performance, accounting data, invoicing, and payment terms will be described in the fully executed United States Government Order Form FS Form 7600B which will represent the TSA’s obligation to pay for the services provided by MSPB as described. Any expenditures by TSA in furtherance of its responsibilities under this MOA are subject to federal budgetary procedures and the availability of funds, which are controlled by applicable laws and regulations. The parties expressly acknowledge that this MOA in no way obligates the United States Congress to appropriate funds to support the objectives stated herein.
12. DISPUTE RESOLUTION. Any disagreement between the parties that may arise in connection with this MOA will be resolved by consultation and discussions between the parties. Should any serious disagreement arise as to the interpretation or implementation of this MOA, and such disagreement cannot be resolved by subordinate officials, the

dispute shall be reduced to writing by each party and presented to senior officials within each party's organizational structure. If the disagreement cannot be settled at that level, the parties may use the Treasury Financial Manual dispute resolution process referenced in box 16 of the United States Government General Terms & Conditions (GT&C) FS Form 7600A, and the dispute may give rise to termination.

13. SEVERABILITY. Nothing in this MOA is intended to conflict with the current laws, regulations, or directives of either party. Any portion of this MOA that is inconsistent with such authority shall be invalid. However, if any portion is found to be invalid, the remaining terms and conditions of the MOA will remain in full force and effect.

14. MODIFICATION. This MOA may be modified upon the mutual consent of the parties. Any substantial modification will be documented in writing and signed by the same (or equivalent) party representatives that sign this MOA. Minor modifications or adjustments may be made by mutual consent of the officials indicated in the Points of Contact section, above, and documented in writing and signed by those officials or in email correspondence between those officials.

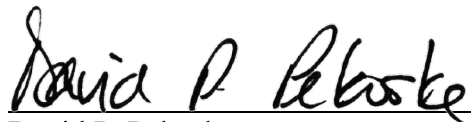
15. APPROVED BY:

U.S. MERIT SYSTEMS PROTECTION BOARD

William Spencer Digitally signed by William
Spencer
Date: 2021.09.09 16:46:53 -04'00'

William D. Spencer
Acting Executive Director
U.S. Merit Systems Protection Board
Dated:

TRANSPORTATION SECURITY ADMINISTRATION

 9/13/2021

David P. Pekoske
Administrator
Transportation Security Administration
U.S. Department of Homeland Security
Dated: