

HOW YOUR SECURITY SCREENER WHISTLEBLOWER COMPLAINT WILL BE PROCESSED BY THE OFFICE OF SPECIAL COUNSEL

Introduction

Transportation Security Administration (TSA) security screeners are protected from reprisal for whistleblowing by TSA Directive HRM Letter No. 1800-01 issued on November 20, 2002, and a Memorandum of Understanding (MOU) between the Office of Special Counsel (OSC) and TSA executed on May 28, 2002. The Directive prohibits TSA employees from taking personnel actions against TSA security screeners in reprisal for making protected disclosures. Under the provisions of the Directive and the MOU, OSC will investigate allegations of reprisal for protected whistleblowing, and when warranted, seek corrective for any TSA security screener employee who has been subject to reprisal for making protected disclosures.

OSC is an independent federal executive agency that receives, investigates, and prosecutes allegations of prohibited personnel practices and violations of the Hatch Act. OSC also provides a secure channel through its Disclosure Unit for federal workers to disclose government wrongdoing.

Under the Whistleblower Protection Act (WPA), OSC has the authority to investigate and prosecute allegations of twelve statutorily defined prohibited personnel practices. The Act passed by Congress which created the TSA and gave the agency authority to determine the security screeners' terms and conditions of employment, exempted screeners from coverage under the WPA. To ensure that TSA security screeners are protected from reprisal for protected whistleblowing, OSC and TSA entered into the MOU to create an avenue through which security screeners can file whistleblower retaliation complaints with OSC. OSC can then investigate those complaints and recommend to TSA appropriate corrective and/or disciplinary action if warranted.

The sections below provide definitions of protected whistleblowing, and information about how to file a complaint with OSC, how OSC processes complaints and what remedies may be available if OSC determines that a violation of the Directive occurred.

Disclosures Protected by the Directive.

TSA Directive HRM Letter No. 1800-01 protects the same type of disclosures as the WPA. Under the Directive, TSA employees are prohibited from taking or failing to take, or threatening to take, a personnel action because of any protected disclosure of information by a TSA security screener or applicant for a TSA security screener position. Disclosures are protected if they contain information which the discloser reasonably believes evidences:

- a violation of law, rule or regulation,
- gross mismanagement,
- gross waste of funds,
- an abuse of authority, or
- a substantial and specific danger to public health and safety.

A disclosure may be made to any person. However, disclosures of classified or Sensitive Security Information may be made ONLY to persons authorized to receive such information. Disclosures of classified or security sensitive information to persons unauthorized to receive such information are NOT protected.

Note: OSC also operates a secure channel for making disclosures that contain classified or security sensitive information, and OSC protects the identity of persons who use this secure channel.

Protection Provided to Security Screeners under the MOU and TSA Directive HRM Letter No. 1800-01

TSA security screeners may file a complaint with OSC alleging that a personnel action was threatened or taken against them because they disclosed information which they reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

OSC conducts an investigation of the complaint to determine whether reasonable grounds exist to believe that retaliation has occurred.

In appropriate cases, OSC may recommend that TSA stay a personnel action pending completion of its investigation.

If OSC concludes that it does not appear that retaliation occurred, it advises the complainant of its preliminary conclusions and gives the complainant an opportunity to respond. OSC considers any response from the complainant before making a final determination on the matter.

If OSC concludes that there are reasonable grounds to believe that retaliation has occurred, OSC may attempt to obtain corrective action for the complainant informally through negotiating a settlement with TSA. When warranted, OSC also may make a disciplinary action recommendation to TSA against the retaliating official who took a personnel action against a TSA security screener because of that individual's protected whistleblowing.

If the matter cannot be settled informally, OSC sends a formal "Report on Findings and Recommendations" to the Under Secretary of Transportation for Security

recommending corrective and/or disciplinary action. The Under Secretary then has 30 days to advise OSC of what action, if any, will be taken.

The Directive also requires TSA employees to cooperate with OSC investigations. Accordingly, TSA must make witnesses and documents available to OSC, at its request. In addition, TSA employees are required to give truthful testimony to OSC.

Filing a Whistleblower Retaliation Complaint with OSC

All complaints must be submitted on OSC Form 11. (Complaint of Prohibited Personnel Practice or Other Prohibited Activity.) OSC will not process complaints submitted in any format other than a completed Form OSC-11. Form OSC-11 may be printed directly from the OSC web site at www.osc.gov (see Forms and Publications). To receive a mailed copy of Form OSC-11, TSA security screeners may contact OSC at (800) 872-9855 or (202) 254-3670.

Note: OSC Form 11 references several prohibited personnel practices and discusses employees' right to file an appeal with the Merit Systems Protection Board (MSPB). Under the MOU, OSC's authority to investigate complaints from TSA security screeners is limited to allegations of whistleblower reprisal. In addition, TSA security screeners do not have the right to file appeals with the MSPB.

OSC requires everyone who seeks an investigation of a complaint alleging reprisal for whistleblowing to select one of three consent statements (Form OSC-49). This consent form is part of OSC Form 11, and must be completed before OSC will proceed with an investigation.

The section of OSC Form 11 that requests information about the nature and timing of the disclosures and the alleged retaliatory personnel actions must be completed before OSC will review the complaint. Completed OSC complaint forms must be sent to:

U.S. Office of Special Counsel
Complaints Examining Unit
1730 M Street, NW, Suite 218
Washington, DC 20036-4505.

OSC has a policy of open communication with complainants. OSC provides complainants with the names and telephone numbers of the OSC staff members assigned to their complaints. In addition, the assigned Examiner, Investigator or Attorney sends a status report on the complaint 90 days after the acknowledgement letter and every 60 days thereafter while the matter is active.

OSC Procedures for Handling Whistleblower Complaints

Complaints Examining Unit (CEU) CEU receives complaints filed with OSC and initially analyzes each allegation. Within 15 days of receipt of a complaint, CEU sends

a letter to the complainant acknowledging receipt of the complaint and identifying the CEU Examiner assigned to handle the complaint. When necessary, the CEU Examiner contacts complainant for additional information to ensure that CEU clearly understands the nature of and basis for each allegation. CEU conducts further inquiry to the extent necessary to determine whether the allegation warrants additional investigation.

After the CEU examination of the complaint is complete, OSC makes a determination either to close the complaint, or if the complaint states a potentially valid claim, to refer it to one of OSC's Investigation and Prosecution Divisions (IPD) for additional investigation and legal analysis. If the complaint is referred to IPD, CEU sends a letter to the complainant informing her or him of this action, and encloses information about the IPD process.

If CEU has concluded that the complaint should be closed, the Examiner sends the complainant a preliminary determination letter that sets forth the reasons to close the file on the complaint. The complainant has an opportunity to respond to this preliminary determination within 16 days, and to offer additional information or arguments in support of his or her allegations. OSC will consider any response before making a final decision on the complaint.

Alternative Dispute Resolution (ADR) Unit OSC offers mediation in selected cases that have been referred for investigation. Participation in the OSC mediation program is completely voluntary for both the complainant and TSA. If both parties agree to mediate their dispute, an OSC mediator will facilitate a discussion between the parties to reach a mutually agreeable resolution to the complaint. For more information on mediation at OSC, click on the Alternative Dispute resolution link on OSC's web site, or ask OSC for a copy of its brochure on ADR.

Investigation and Prosecution Division (IPD) IPD staff conducts investigations to review pertinent records, and interview complainants and witnesses with knowledge of the matters alleged. Matters that are not resolved during the investigative phase undergo legal review and analysis to determine whether the IPD inquiry has established that there are reasonable grounds to believe that retaliation has occurred, and whether the matter warrants corrective action, disciplinary action, or both.
Stays of a Personnel Action Pending Investigation of the Matter

An individual may request that OSC seek to delay, or "stay," an adverse personnel action pending an OSC investigation. If the available evidence shows that there are reasonable grounds to believe that retaliation has occurred, OSC may ask the TSA Case Liaison to delay the personnel action. If the Case Liaison does not agree to a delay, OSC may then make a formal written request to the Under Secretary of Transportation for Security. (OSC cannot stay a personnel action on its own authority.)

Corrective Action

OSC may enter into discussions with TSA at any stage of a pending matter in pursuit of a resolution acceptable to all parties. Generally, corrective action is intended to place the employee back into the position the employee would have been in had the alleged retaliation not occurred. Corrective actions may include expunging a letter of reprimand, reversing a suspension or other adverse actions, job restoration, and reimbursement of costs for damages incurred as a result of the retaliatory personnel action.

If OSC determines that corrective action is warranted, the investigator or attorney contacts the complainant and TSA to discuss settlement of the complaint. Occasionally it is not possible to restore the complainant to the exactly the same position he or she would have been in if the retaliation had not occurred, or the complainant may not want to be placed in that position. In such cases, OSC attempts to negotiate a resolution acceptable to both the complainant and TSA.

In some cases, where OSC determines that the retaliation was particularly harmful or willful, OSC may make a disciplinary action recommendation against the retaliating official to the Under Secretary of Transportation for Transportation Security. More information about OSC and the protections it offers to TSA security screeners, and to other federal employees, may be found on the OSC web site at www.osc.gov. The OSC website has dedicated a web page containing document links specifically for TSA security screeners (www.osc.gov/tsa-info.htm)