

DECLARATION OF DAVID A. BORER

I, David A. Borer, make the following declaration in accordance with the provisions of 28 U.S.C.

§ 1746. I have personal knowledge of the matters contained in this declaration:

1. I am presently the General Counsel of the American Federation of Government Employees National Union (“AFGE”).
2. AFGE is a labor organization as defined by, *inter alia*, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*
3. On June 29, 2011, the U.S. Federal Labor Relations Authority certified AFGE as the exclusive representative for a bargaining unit composed of the following employees of the U.S. Transportation Security Administration (“TSA”):

All full and part-time non-supervisory personnel carrying out screening functions under 49 U.S.C. Section 44901, as that term is used in ATSA Section 111(d): Transportation Security Officers; Lead Transportation Security Officers; Master Transportation Security Officers (which includes Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians); and Expert Transportation Security Officers (which includes includes Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians) of the Transportation Security Administration, Department of Homeland Security.

4. As a result of this certification, AFGE, on its own and through affiliated council and local unions, represents a bargaining unit of approximately 45,000 TSA officers in collective bargaining with TSA, litigation to enforce employment and labor rights, and lobbying in Congress.
5. TSA officers who are represented by AFGE, and who are members of AFGE, engage in a number of significant duties with respect to aviation security. In particular, Transportation Security Officers represented by, and belonging to, AFGE are responsible

on a continuing basis for the face-to-face security screening of passengers before such passengers may board aircraft in the United States. As part of this responsibility, these Transportation Security Officers are also responsible for enforcing the TSA Prohibited Items List and, when necessary, confiscating prohibited items.

6. In my capacity as General Counsel of AFGE and in furtherance of AFGE's representation of TSA officers, I testified orally and in writing against the removal of knives from the Prohibited Items List on April 11, 2013, before the Subcommittee on Transportation Security and Infrastructure of the House Committee on Homeland Security on TSA's Efforts to Advance Risk-Based Security: Stakeholder Perspectives.
7. A true and accurate copy of my written testimony is attached to this declaration as Exhibit 1. I hereby incorporate my written testimony, contained in Exhibit 1, into this declaration as if fully set forth herein.
8. An official, final transcript of my oral testimony is not presently available.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2013.


David A. Borer



AFGE Congressional Testimony

STATEMENT BY

**DAVID A. BORER
GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO**

BEFORE THE

**SUBCOMMITTEE ON TRANSPORTATION SECURITY
HOUSE COMMITTEE ON HOMELAND SECURITY**

ON

**TSA'S EFFORTS TO ADVANCE RISK-BASED SECURITY:
STAKEHOLDER PERSPECTIVES**

APRIL 11, 2013

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Mr. Chairman, Ranking Member Richmond, and Members of the Subcommittee, my name is David A. Borer, and I am the General Counsel of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the members of our union, which represents more than 650,000 federal employees, including 45,000 Transportation Security Officers (TSOs) working on the front lines of aviation security, I thank you for the opportunity to testify today regarding stakeholder perspectives on the Transportation Security Administration's (TSA) efforts to advance risk-based security.

Risk-Based Security

AFGE and the TSOs we represent are on record supporting the principle of risk-based security. Careful, risk-based analysis can help to focus TSA's work on genuine risks to safety and security, while eliminating unnecessary procedures and identifying low-risk individuals who require less scrutiny. However, risk-based security decision analysis like the kind that resulted in the decision to end the ban on knives, is not a model that should be duplicated. The decision to end the ban on knives was hopelessly flawed and certainly failed to account for the risk posed by knives.

Operational experience and common sense tell us that allowing knives through the checkpoint and onto the aircraft *increases* the safety and security risk to TSOs, crew members and passengers. TSOs, air marshals, flight attendants and pilots oppose the new policy because it increases the risk they face on the job. Even some airline CEOs have spoken out against lifting the knife ban; a rare consensus of opinion between labor and management in the airline industry.

The TSOs represented by our union share with TSA the goal of ensuring the safety and security of air travel in the United States. Our TSOs are sworn to protect air travelers and their families and loved ones, as well as the hundreds of thousands of workers who make commercial aviation possible. Despite all the unfounded criticism heaped on TSA and these officers, the bottom line is that they have been successful in making air travel safer. There has not been a repeat of the September 11 style attacks since TSA was put in charge of aviation security. Enormous quantities of deadly contraband – including knives – have been stopped at the security checkpoints, preventing it from being carried onto the aircraft. Where private security companies failed us on September 11, TSA has had an effective record in preventing further attacks.

Failure to Consult with AFGE and the TSOs

Against this background, TSA's sudden change of policy, without consulting TSOs and their union in any formal way, makes no sense. We understand that, to be successful, TSA must stay several steps ahead of terrorists through procedures and technology that evolve in response to real-time intelligence developments. TSOs have the hands-on operational experience to know that a policy change like this will increase risks for themselves and others, and will have other unintended consequences like longer security lines. Their input could have proven invaluable in the process leading up to the decision of whether to change the ban on knives. It seems illogical, then, that TSOs are often the last to be informed of screening changes they are to implement, and are routinely denied any meaningful input to inform those decisions. In this case, TSOs and AFGE were informed of the policy change, just minutes before the public announcement, by a

TSA official who kept looking at his watch for fear that he was going to miss the announcement. The extremely short briefing permitted virtually no dialog, nor was our input sought in advance. TSA Administrator Pistole has referred to TSOs as “effective” “professional” and “integral” to the agency’s mission. However TSA’s refusal to engage with the largest segment of its workforce and their duly elected exclusive representative has actually hampered the agency’s ability to seamlessly function as an intelligence-driven, risk-based operation.

This failure to consult with key stakeholders on the frontline of aviation safety and security became all the more intolerable when reports were published indicating that lobbyists for the knife industry were consulted. In fact, they now claim to have been “instrumental” in winning the change, and they quote an anonymous TSA official as thanking knife industry representatives for their “assistance” in lifting the ban. Administrator Pistole issued a brief denial that he had considered the views of knife industry representatives in making his decision, but TSA has not denied that the meetings took place nor disclosed what role they played in influencing TSA staff responsible for developing the policy for the Administrator’s review and approval. The knife industry has no role nor any responsibility for aviation safety and security, only a commercial interest. If they are to be considered a stakeholder at all, they must be considered subordinate to the stakeholders who have a direct role in keeping air travel safe and secure.

Despite unlimited opportunities to engage AFGE – the exclusive representative of every one of the 45,000 TSOs working at our nation’s airports – since the summer of 2012, TSA defiantly and deliberately ignored every opportunity to hear firsthand the valid concerns of the workforce regarding the knife policy. There is nothing in the Aviation and Transportation Security Act (Pub. L.107-71) that absolves TSA of the duty to engage AFGE as the exclusive representative of TSA employees. In granting a representation election for TSA employees, the Federal Labor Relations Authority (FLRA) stated that the following rights apply to exclusive representatives irrespective of the extent of collective bargaining. The FLRA wrote:

For example, § 7114(a)(1) provides exclusive representatives with not only the right to “negotiate collective bargaining agreements covering” unit employees, but also a separate right to “act for” those employees. Additionally, § 7117(d)(1) gives certain exclusive representatives the right to “consultation rights[,]” separate and apart from the right to engage in collective bargaining. Further, § 7114(a)(2)(A) entitles the exclusive representative to be represented at certain “formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment [.]” In this connection, the Authority has held that the definition of “grievance” is not dependent on the scope of a negotiated grievance procedure. *See *247 Luke Air Force Base, Ariz.*, 54 FLRA 716, 730 (1998), *rev’d* 208 F.3d 221 (9th Cir. 1999). As such, the right of an exclusive representative to attend formal discussions under § 7114(a)(2)(A) does not require the existence of a collective bargaining agreement. *U.S. Department of Homeland Security, Transportation Security Administration and AFGE*, 65 FLRA 242, 246 (2010).

Administrator Pistole himself also recognized both the obligation of the agency to consult with AFGE as the exclusive representatives of TSOs and the importance of labor-management consultation to assist the agency in accomplishing its mission of transportation security. According to the Determination dated February 4, 2011 (Determination), "Labor management relations must be results oriented, designed to solve problems and resolve issues rather than defer resolution through resorting to lengthy, multiple, adversarial avenues." The Determination further noted that "TSA management must . . . act in a manner characterized by cooperative problem solving approaches to raising, addressing, and seeking resolution of issues." *Determination* at Page 5 and 15. President Obama also signed Executive Order 13522 to create labor-management forums throughout the government to "establish cooperative and productive labor-management relations" throughout the Executive branch. AFGE is a member of Department of Homeland Security labor-management forum established in 2011 by Secretary Janet Napolitano.

On March 21st, 2013 Rep. Bennie Thompson, Rep. Eric Swalwell and Rep. Cedric Richmond, along with 133 other members of Congress sent Administrator Pistole a letter expressing concern about the changes in the PIL and, in part, questioning the apparent lack of consultation with AFGE, unions and other stakeholders. On April 3, 2013 Administrator Pistole responded in a letter that included an enclosure in which the Administrator mentions informal conversations with TSOs, and the National Advisory Council, a body with no standing that represents no one at the Agency. Administrator Pistole even mentions 2000 votes in support of expanding the list of permitted items on the Idea Factory, a form of online poll at the agency. Considering TSA employs over 45,000 TSOs, a vote of support of slightly over 4% of the total TSO workforce indicates an overwhelming lack of support from the majority. This alleged worker "input" is contrary to the consultations with the exclusive representative required by the FLRA and the Pistole Determination.

Changes to the Prohibited Items List (PIL).

This is not simply about failure to consult with AFGE and other key stakeholders, or lack of notice, or a breakdown in procedures. This is about "ensur[ing] the safety and integrity of *all* persons providing services with respect to aircraft providing passenger air transportation," as referred to in ATSA. 49 U.S.C. § 44903(h)(4)(C)(i), (emphasis added). TSA would have us believe that the agency's mission is limited to matters concerning the catastrophic loss of an aircraft. But, the mission is much broader, as the above passage from ATSA indicates, and the prohibited items list is critical to accomplishing that mission.

TSA has previously modified its PIL to allow TSOs to clear passengers with items such as knitting needles, small scissors and nail clippers through checkpoint. But in March, the Agency announced that, for the first time since 2001 passengers would be able to carry items that not only can be *used* as weapons, but actually *are* weapons through checkpoints and onto planes. Make no mistake about it: a blade of 2.36 inches is a weapon whether it folds, locks or is fixed.

The transition from an absolute prohibition on knives to a policy that requires a TSO at a fast-moving checkpoint to determine the size and type of a knife will result in inevitable resistance by certain passengers. Although the Administrator has stated TSOs will be trained to refrain from opening folding or pocket knives, AFGE fails to see what will prevent a determined

passenger from opening the knife at a checkpoint. Assaults and occasional battery are already almost routine for TSOs. Under the new policy, those irate passengers will now be, potentially, armed with a knife, increasing the risk of injury or worse.

That TSO is a member of AFGE. When the union contacted her after the incident to see if she needed our assistance, one of the first things she said was “what would have happened if that person had a knife?” Admittedly, this incident took place at the exit lane, not at the checkpoint screening equipment. But it demonstrates the threat TSOs face every day when they go to work; a threat that will only increase as more knives pass through the airport.

Based on our members’ experience, I predict that it won’t be long – perhaps days, maybe less – under the new policy before some passenger will start a verbal altercation with a TSO. An irate passenger will not be able to resist arguing over the length of the knife, its design, or other reasons a TSO may have decided it must be excluded. Passengers snatch items out of TSOs hands all the time. Now we face the risk that a passenger will say something like “give me that knife, I’ll show you it’s not too long.” Or, “I’ll show you it’s not a locking blade.” Suddenly there’s an angry passenger with an open knife at the checkpoint.

TSA’s answer, at least informally, has been that no knives should be opened at the checkpoint, none will be measured. Management tells us it’s a TSO judgment call and TSA will not second-guess the officer’s decision. We’re told if something happens, “call a supervisor.” Saying that is how the policy *should* be implemented is easy. But officers with thousands of hours of experience on the checkpoint know that making it actually work that way in the day-to-day operation, with millions of passengers streaming through the checkpoint, is impossible.

The changes to the PIL have also caused outrage among the nation’s flight attendants. They too have seen a growing number of assaults and batteries, so much so that the term “air rage” has entered our collective vocabulary. TSA’s carefully worded letter to members of Congress notes that no flight attendant in the U.S. has been attacked with a knife. Several of the terrorists on September 11th, were armed with pocket knives, not just box cutters. Flight attendants in other countries have been attacked with knives as recently as 2011. Beyond the everyday threat of terrorism, flight attendants are confronted by the same irate passengers our TSOs deal with at the checkpoint. In fact, in some cases, passengers have been known to commit an assault or even a battery on a TSO at the checkpoint, only to be waived through by a supervisor and allowed to board a flight.

The new PIL also has the potential to increase screening lines at checkpoint at a time when sequester is thinning the ranks of TSOs through unfilled positions, loss of overtime and possible furloughs in the future. TSOs also are concerned about training for the new PIL when the sequester has placed additional pressure on training time that was too limited to begin with. In short, TSOs are very, very concerned.

Conclusion

Finally, there is something very troubling about the dismissive way TSA treats the increased threat that knives pose to TSOs, flight attendants and passengers. TSA management does not deny that there is some risk posed by knives. Yet, they just keep repeating the talking point: no catastrophic loss of the aircraft. That statement is a veiled reference to the cockpit door,

locked and reinforced since September 11, presumably impenetrable by assailants with small knives. By omission, TSA's statement concedes that there may be some casualties in the cabin as a result of knives on planes, just not enough to result in the catastrophic loss of the aircraft. Even the U.S. military is more open about what it considers to be acceptable collateral casualties. With this focus exclusively on catastrophic loss of the aircraft, TSA demonstrates an approach that is directly in conflict with the mission to ensure the safety and integrity of *all* persons providing services" in the airline industry.

If we learned anything on September 11 it is that desperate and fanatical people can wreak havoc and commit unspeakable acts of death and destruction in air travel. Knives must continue to be banned from commercial aviation because allowing passengers to carry knives increases the risk to safety and security at the screening checkpoint and on the aircraft. TSA's mission is to reduce or prevent breaches of safety and security, not *increase* them. If TSA does not reinstate the knife ban for the reasons cited above, then Congress should impose the ban. Knives have no place on airplanes, ever again.