



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

May 8, 2012

The President
The White House
Washington, DC 20500

Re: FAA Oversight Deficiencies

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find agency reports responding to seven recent whistleblower disclosures of safety lapses at commercial aviation facilities in the United States, including major airports.¹

These disclosures were made to the Office of Special Counsel (OSC) by eight employees of the Department of Transportation's Federal Aviation Administration (FAA). They were not made simultaneously or with coordination. Rather, because of their proximity in time, the serious safety concerns raised, and the recurring nature of the problems at this agency, I have consolidated the seven reports and their accompanying, statutorily-required investigations by the Department of Transportation (DOT).

Seven of the eight whistleblowers notified the FAA of their concerns before filing disclosures with OSC. Four of these eight whistleblowers filed repeat disclosures with OSC when they observed that corrective actions were not sufficient to resolve their safety concerns or were promised but not implemented.

The broader problem that these disclosures represent, together with a pattern of insufficient responses by the FAA, require additional scrutiny. OSC has reviewed all FAA whistleblower disclosure cases brought to the agency from fiscal year 2007 to the present. This series of complaints suggests deficiencies in the FAA's oversight function and stands out among OSC's caseload in myriad ways:

- FAA has one of highest rates of whistleblower filings per employee of any executive branch agency. OSC received a total of 178 FAA disclosures from fiscal year 2007 to the present, 87 of them related to aviation safety.
- The disclosures have merit: Fifty percent of the 87 public safety related disclosures met

¹ OSC File Nos. [DI-11-0747](#); [DI-10-2602](#); [DI-11-1677](#); [DI-10-0680](#); [DI-11-2238](#); [DI-11-2709](#); [DI-11-1353](#); [DI-11-0165](#); and [DI-11-1675](#)

our threshold for referring the disclosure to DOT for investigation. This compares with OSC's overall referral rate of five percent for other government agencies.

- All but five of the OSC public safety referrals -- 89 percent -- were ultimately substantiated or partially substantiated by DOT in its subsequent investigations.
- In many cases, even where DOT has substantiated the allegations, OSC has found the agency's reports unreasonable because of delays or the lack of appropriate or timely corrective action.

By law, I am charged with providing you and Congress a report on the resolution of disclosures that OSC refers to agencies for investigation, accompanied by the agency report and the whistleblowers' comments. This transmittal is the final chapter in OSC's formal oversight process. While OSC will continue to monitor these matters, additional enforcement action rests with Congress or the White House. Given the recurring and serious nature of these concerns, I write with a strong recommendation that more rigorous oversight measures be put in place at DOT and FAA to ensure a higher standard for aviation safety.

* * * * *

The following is a synopsis of the seven specific disclosures transmitted to you today. Briefly, these disclosures are:

- Emergency service helicopters used by first responders nationwide were incorrectly retrofitted for night vision goggles, potentially posing a threat to pilots' ability to read instruments;
- Air traffic controllers in the greater New York airspace slept in the control room, left their shifts early, used personal electronic devices while on the job, and used dangerously imprecise language when communicating with pilots, resulting in a near-crash;
- Aircraft were cleared to depart New Jersey's Teterboro Airport with inadequate separation from heavy jet aircraft on final approach to Newark Liberty International Airport;
- Delta's inspection and maintenance programs for fuel tank and electrical wiring interconnection systems were not in compliance with airworthiness directives and federal regulations;
- Unauthorized aircraft were frequently found in the U.S. airspace near San Juan, Puerto Rico;
- Inconsistent rules for operations on parallel runways result in operational errors and deviations because controllers at Detroit Metropolitan Airport (DTW) are unable to

simultaneously observe rules for missed approaches while maintaining appropriate separation from parallel runways; and

- Faulty wind instruments are being relied upon at DTW, among other concerns.

These allegations were each referred to the Honorable Ray LaHood, Secretary of Transportation, for investigations pursuant to 5 U.S.C. § 1213(c) and (d). Secretary LaHood referred the investigations to the DOT's Office of Inspector General (OIG) or the FAA's Office of Audit and Evaluation, both of which conducted their investigations with input from FAA safety offices. I have reviewed the original disclosures, the agency reports, and comments from the whistleblowers and, as required by law, made determinations on the reasonableness of the agency findings. As detailed below, in one case I found the DOT report reasonable; in two cases I found the DOT reports reasonable, but note with concern that unreasonable delays occurred or corrective action remains to be completed. In four other cases, I found DOT's actions unreasonable.

1. Rand Foster, an Aviation Safety Inspector in Renton, Washington, disclosed that modifications to hundreds of emergency medical service helicopters for a night vision imaging system did not comply with required specifications, making the instrumentation potentially difficult to read under certain conditions, both during daytime and nighttime operations. These helicopters are used nationwide by first responders. Further, Mr. Foster disclosed that when FAA learned of the problem, it still failed to implement a formal process to ensure that the helicopters were brought into compliance.

This disclosure is a repeat disclosure: Mr. Foster first reported the lack of FAA action on incorrect modifications to OSC in 2008 and OSC referred the disclosures to then-DOT Secretary Mary E. Peters. An investigative report was due within 60 days; OSC granted DOT five extensions totaling more than one year, yet did not receive an investigative report. Given the serious nature of the safety allegations and the length of time that had passed, OSC transmitted the first disclosure to you and Congressional oversight committees in 2009, noting the Secretary's failure to submit a report.

Mr. Foster then reported to OSC in 2010 that FAA had still failed to adequately bring the helicopters into compliance. Mr. Foster disclosed that the modifications included filters that were improperly installed on instruments and radios in the helicopters, some of which significantly impaired the pilot's ability to read the instruments during daylight as well as night operations without night vision goggles. The installations also had reflections and incompatible light sources that interfered with the pilot's vision while using the goggles under emergency operation conditions.

The agency's report to OSC in response to the 2010 disclosures found that the helicopters were returned to service contrary to FAA policy and that there were "possible impacts to safety," with more than 50 erroneous field approvals performed by an FAA Aviation Safety Inspector. Moreover, of the 29 aircraft inspected as of the date of the report, all had non-

compliances and/or non-conformances. Of the 278 findings of non-compliance, 51 (18%) were potential safety concerns. Notably, between the time of Mr. Foster's 2008 allegations to OSC and the subsequent re-referral of his disclosures in 2010, the number of helicopters returned to service with potentially non-compliant modifications more than doubled. The reports indicated that up to 500 aircraft could be affected.

As a result of the investigation following Mr. Foster's second disclosure in 2010, FAA has put into place a comprehensive corrective action plan to address all night vision modified aircraft. I remain concerned, however, that it required the years-long persistence of one whistleblower and two referrals from my office for FAA to acknowledge that its oversight was lacking and to institute a comprehensive plan to systematically ensure compliance and, consequently, safety. Therefore, I have determined that DOT's findings are not reasonable. I have notified DOT that I intend to request an update within two months on the status of corrective actions.

2. Evan Seeley, an Air Traffic Controller formerly assigned to the New York Air Route Traffic Control Center (ARTCC), alleged that controllers violated required air traffic control procedures and FAA rules, which compromised aviation safety. These violations included sleeping in the control room; using careless and casual language in their communication with pilots, resulting in at least one serious operational error with aircraft in dangerous proximity; using personal laptops, playing video games, and watching movies while on duty. He further alleged that controllers engaged in improper work slow-downs/stoppages and leave abuse to increase overtime, and that they routinely left their shifts early.

The investigation substantiated most of the allegations, including controllers' non-compliance with air traffic procedures, work stoppages, using electronic devices, sleeping in the control room, and leaving their shifts early. The report outlines several corrective actions, including replacement of the management team at the ARTCC with an interim team and disciplinary action against three of the five managers. I am satisfied that the agency has taken prompt and appropriate action, and I find DOT's report reasonable. I note, however, that the agency may have been spurred into taking corrective actions by media attention in 2011 to some of these issues. I also recommend that the agency conduct periodic unannounced inspections to ensure that the corrective actions that have been implemented remain in place.

In addition, another whistleblower with nearly identical allegations from a different air traffic control tower recently filed a disclosure with OSC. I referred this case as well to the Department of Transportation.

3. Dean Iacopelli, an Air Traffic Controller at the New York Terminal Radar Approach Control, contended that the FAA had prioritized increased capacity over public safety by allowing aircraft departing Teterboro Regional Airport in New Jersey to fly directly below and in close proximity to heavy jet aircraft on final approach to Newark's Liberty International Airport.

Specifically, Mr. Iacopelli alleged that an air traffic procedure known as the Dalton Departure Procedure (Procedure) was being used both incorrectly and as a routine means of avoiding separation requirements that resulted in significant delays for Teterboro departures and arrivals of commercial flights into Newark. Mr. Iacopelli reported his concern in early 2009 to FAA, which conducted an investigation and found problems with the Procedure and recommended various corrective measures. Mr. Iacopelli stated that these proposed measures were not implemented but, in any case, were insufficient in scope, citing a near-collision in December 2009 that had involved FAA-compliant use of the Procedure.

The OIG for DOT acknowledged that the Procedure “may pose a safety hazard.” In the course of its review, OIG found a significant increase in the number of incident reports on the Procedure over the last decade as well as four pilot deviations in the last few years, one of which involved a near-collision in which the aircraft were within 200 vertical feet of each other and less than three-quarters of a mile apart laterally. OIG also found numerous incidents that had not been reported. Nonetheless, OIG found “no substantial evidence” that pilots flying the Procedure experienced safety issues as a result of wake turbulence and reported that no further corrective action would be taken until an additional audit was completed in March 2011.

Following the audit, which confirmed ongoing safety issues, FAA took some corrective action, such as publishing a revised notice that included a warning of wake turbulence. However, FAA maintained its position that the Procedure was a “safety enhancement.”

Finally, in September 2011, FAA agreed to modify the Procedure to increase the separation between aircraft because, according to the corresponding FAA notice, the Procedure “poses a safety hazard.” OSC learned of this corrective action only from Mr. Iacopelli; we were not contacted by FAA or DOT. Mr. Iacopelli is satisfied that the modified Procedure has resolved the safety hazard.

It is disturbing that FAA failed to resolve these issues for more than two years and that, even after having done so, it failed to explain its contradictory prior assessment. Therefore, I have determined that DOT’s findings are not reasonable. I have notified DOT that I intend to request an update within the next two months.

4. FAA Aviation Safety Inspectors Mark Lund and Daniel Mirau alleged that officials in the Delta Certificate Management Offices in Atlanta, Georgia, and Bloomington, Minnesota, failed to properly oversee Delta Air Lines, Inc., (Delta) and failed to ensure that Delta’s maintenance programs for the fuel tank and electrical wiring interconnection systems complied with Airworthiness Directives and federal regulations. The additional requirements for these maintenance programs were put in place following the July 1996 crash of TWA 800, caused by a fuel tank explosion, and the 1998 accident of SwissAir 111, attributed to an in-flight wiring fire.

Mr. Lund first disclosed allegations regarding FAA’s lack of oversight to DOT in 2005 and to OSC in 2008. Those earlier disclosures also regarded FAA’s lack of oversight of inspection and maintenance programs. The subsequent DOT investigation in 2009 largely

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substantiated Mr. Lund's allegations. Despite the findings of that investigation, Mr. Lund -- this time joined by Mr. Mirau -- disclosed similar concerns regarding lack of oversight and noncompliance in 2011.

DOT again investigated, partially substantiated the allegations, and found that: 1) at the time of the whistleblowers' complaint, FAA had not taken action to address the referenced discrepancies in Delta's maintenance programs, but now does have an action plan; 2) FAA implemented recommendations from the 2009 investigation into Mr. Lund's first disclosure, however, those actions were ineffective and, as a result, the second investigation substantiated the whistleblowers' allegation that non-compliance continued; 3) FAA regional counsel had not finalized the enforcement case against Delta for non-compliance that was referenced in Mr. Lund's 2008 disclosure, however, the agency intends to take action on that case; and 4) Delta's failure to comply with these maintenance programs demonstrated a failure of the Continuing Analysis and Surveillance System.

I have determined that DOT's findings are reasonable. Notwithstanding this finding, it is troubling that concerns regarding FAA's oversight of these critical maintenance programs persisted. FAA must act to fully resolve the gaps in oversight which have allowed the airline's noncompliance to continue. I intend to request an update in six months to confirm that the outstanding corrective actions are complete.

5. In May 2011, Edgar Diaz, an FAA Air Traffic Controller in the San Juan Center Radar Approach Control in San Juan, Puerto Rico, alleged an ongoing danger to the flying public traveling through national airspace near Puerto Rico as a result of FAA employees' failure to respond adequately to foreign facility deviations (deviations).

Mr. Diaz had made this same allegation to OSC in 2008 and the FAA committed in its investigative response to OSC to resolve the problem. In his repeat disclosure, Mr. Diaz reported that deviations continued to pose a safety risk to the flying public and that FAA management had not adequately implemented corrective action, as promised, including the installation of a communications (shout) line.

The September 30, 2011 report partially substantiated Mr. Diaz's allegations. Although the report found that deviations had continued, the rate was significantly reduced compared to previous years and thus, the agency did not find that there was a substantial and specific danger to public safety. The report stated that the agency was nevertheless concerned about deviations and would continue to monitor them in conjunction with increased cooperation between FAA and the Dominican Republic. In 2009, according to the report, FAA San Juan recorded 52 foreign facility deviations, 76 in 2010 and 19 in 2011.

In its latest communication with OSC on January 11, 2012, FAA stated that it had approved new policies to require the reporting and tracking of deviations. Specifically, beginning January 30, 2012, deviations were required to be recorded and archived. The FAA also released new safety policies on deviations in December 2011. Under these new policies,

FAA will investigate and retain data on all deviation reports in order to identify trends and provide analysis. In addition, the Office of Chief Counsel is reviewing new proposals to initiate radar sharing capabilities between San Juan and the Dominican Republic. These policies and agreements will be a template for a future radar sharing agreement initiative with St. Maarten. The “shout line” between San Juan and Santo Domingo facilities was to be established in early 2012, but as of the date of this letter is not yet in place. Although the agency has taken steps to address this issue, deviations continue to occur in FAA San Juan’s airspace.

Notwithstanding my determination that the agency report on Mr. Diaz’s disclosure is reasonable, I find it troubling that Mr. Diaz was compelled to file a second time with OSC in order to refocus DOT’s attention on implementing promised plans of action. I have requested that DOT provide OSC with an update in three months regarding its progress on these matters.

6. Brian Gault and Vincent Sugent, both Air Traffic Controllers at DTW, disclosed that two FAA rules are in direct conflict with each other and cannot be simultaneously observed. These inconsistent requirements create confusion, put controllers in the untenable position of committing regular operational errors (which are usually unreported), and create a threat to public safety.

Controllers in the air traffic control tower are charged with keeping aircraft properly and safely apart while efficiently landing and departing. At DTW, similar to other airports nationally, including the proposed runway configuration at O’Hare International Airport, controllers land and depart aircraft simultaneously on parallel runways. They are required to keep these aircraft a certain distance apart while also protecting airspace in the event that an arriving aircraft cannot land and must “go around” for another attempt. Mr. Gault and Mr. Sugent alleged that in poor weather conditions, when aircraft are not visible and radar is used for separation, the controllers are not always able to follow all of the requirements for keeping planes apart.

The OIG’s investigation substantiated Mr. Sugent and Mr. Gault’s allegations. The OIG reported that under certain circumstances, it is impossible for air traffic controllers to simultaneously comply with the two FAA directives in question (Paragraphs 5-8-3 and 5-8-5 of FAA Order 7110.65). Additionally, OIG found that some air traffic control staff in DTW, including management, misunderstood these FAA directives. As a result, some staff received inadequate guidance or training on them. The OIG report also concluded that operational errors occurred at DTW and were not reported.

FAA plans to review the application of the rules and correct any discrepancies to ensure safe air traffic on parallel runways, including a revision of the go-around procedures to help ensure aircraft separation. FAA also plans to issue a formal restatement of these two air traffic directives. The whistleblowers maintain that this revision is inadequate.

This issue is far from resolved and for that reason, I am unable to conclude that the findings of the agency head are reasonable. At a minimum, the agency has been on notice since

December 2009 that the facility's simultaneous operations on parallel runways may violate FAA Order 7110.65. The conflict presented by the whistleblowers has yet to be satisfactorily resolved over two years later. It is unacceptable that a controller raising a serious safety issue after an incident in which airplanes came dangerously close together must persist in raising the alarm both inside and outside the agency over a years-long period in order to prompt an appropriate review of the matter. I intend to request an update from the agency every three months until corrective actions are completed.

7. Vincent Sugent, an Air Traffic Controller at DTW, also disclosed that unsafe departure procedures and faulty wind source instruments are being used by controllers. Although the agency's investigation did not directly substantiate these allegations, the report states that the two wind measurement instruments at DTW continue to provide disparate wind measurements at times. DOT did not conclude that these disparities resulted in an unsafe and untenable situation for the flying public and the controllers. Despite these findings, the FAA intends to complete a safety-risk analysis to determine the hazards associated with a change in the primary wind source equipment, and to collect data to isolate any technical reason for the divergent readings of the two devices and help eliminate random differences. FAA also intends to improve the timely release of air traffic from DTW by changing published Standard Instrument Departure Procedures so they can be issued to departing aircraft.

The agency's report reflects that very slow progress has been made in two critical areas, both of which could benefit from important aviation safety improvements. Air traffic control could be made safer by implementing standard instrument departure procedures to improve communications between the air traffic control tower and aircraft flying to airports in Ohio. Relocation of the wind instruments at DTW to an area where they would be unaffected by sheltering from nearby buildings is recommended by experts and could improve safety through better dissemination of key wind information to air traffic controllers and pilots. Mr. Sugent recently reported that the agency delayed plans to change published Standard Instrument Departure Procedures, despite the FAA's representation that the new procedure would be implemented in February. Again, FAA failed to advise OSC of this change to its final report.

The FAA has determined that the wind instruments, while disparate, are not unsafe. Notwithstanding this finding, I remain troubled that FAA has left controllers and pilots without adequate tools to confidently perform their jobs, or to support FAA's stated mission -- to provide the safest, most efficient aerospace system in the world. Therefore, I have determined that DOT's report is not reasonable. I intend to request an update from the agency monthly until corrective actions are completed.

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In addition to the seven complaints summarized above, OSC continues to receive disclosures from FAA whistleblowers, often reporting similar abuses. For example, we have recently referred for investigation allegations from an air traffic controller who identified a safety issue that is contributing to losses of separation between aircraft and the failure to report those

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losses. Further, as previously noted, we have also received another disclosure that air traffic controllers are routinely engaging in prohibited activities such as sleeping and texting while on duty.

Additionally, we recently received a report from FAA's Office of Audit and Evaluation that sharply rebukes FAA's specific handling of one OSC-referred investigation and FAA's broader management of numerous Detroit-based whistleblowers. The report, which I have enclosed, condemns the audits regarding a Detroit air traffic control problem as "cursory, almost careless ... without due diligence" and "perfunctory, without a consistent methodology." This FAA self-assessment further finds: "Despite the continued validation of safety allegations at Detroit, we found no evidence demonstrating substantive corrective action remediating these concerns ... [O]versight of operations at Detroit appear to allow, rather than mitigate, recurring safety violations."

These disclosures paint a picture of an agency with insufficient responsiveness given its critical public safety mission. Although the United States' aviation system is the safest in the world, the public properly expects zero tolerance for unnecessary risks. Preventive measures could be far more effective if the Department of Transportation listened to its own employees' alarm bells, and was more prompt in its corrective actions after those alarms were sounded.

As required by law, 5 U.S.C. § 1213(e)(3), OSC has sent copies of the agency's unredacted reports and the whistleblowers' comments to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science and Transportation and the House Committee on Transportation and Infrastructure. I have also filed redacted² copies of those documents and the whistleblowers' comments in our public file, which is available at www.osc.gov/PublicFile1213AgencyRpt.htm.

Respectfully,



Carolyn N. Lerner

Enclosures

² DOT asserts that the names of subject employees and witnesses may not be publicly released, only their titles. OSC disagrees. Under the federal Whistleblower Protection Act, 5 U.S.C. Sections 1213 and 1219, OSC believes the public interest in the release of these names outweighs the privacy interests of the employees. Therefore, OSC shall include the subject employee names, but not witness names, in the closure letter to the President and congressional oversight committees. However, while OSC objects to redacting names in principle, in order to expedite resolution of this matter, OSC has agreed to the redaction of subject employee and witness names in the agency's investigative reports. The redacted reports will be available publicly.