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The Special Counsel

December 3, 2024

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-20-001009

Dear Mr. President:

I am forwarding to you reports transmitted to the Office of Special Counsel (OSC) by the Department of Homeland Security in response to the Special Counsel's referral of disclosures of wrongdoing at the U.S. Customs and Border Protection (CBP), Air and Marine Operations (AMO), Deming Air Unit (DAU), El Paso, Texas. [REDACTED], former Supervisory Air Interdiction Agent, consented to release of his name and commented on the reports. The CBP Office of Professional Responsibility investigated the matter. I have reviewed the disclosures, agency reports and whistleblower comments and, in accordance with 5 U.S.C. § 1213(e), have determined that the reports contain the information required by statute, but the findings do not appear reasonable.

The Allegations

[REDACTED] alleged that Director of Air Operations [REDACTED], Supervisory Interdiction Agent [REDACTED], and Supervisory Air Interdiction Agent [REDACTED], each of whom oversees the DAU in El Paso, repeatedly prevented the DAU from responding to emergency calls in cases where quicker responses might have saved lives. [REDACTED] further alleged that former Acting Director of Air Operations [REDACTED] piloted a helicopter flight into restricted airspace during an unapproved change in mission, intentionally turning off his helicopter's transponder to avoid detection. Following the incident, [REDACTED] subordinates conducted a cursory review of his unauthorized flight actions culminating in a report containing false statements. Finally, [REDACTED] alleged that AMO officials frequently approve the use of aircraft for questionable purposes and made a series of management decisions that hinder the DAU's ability to fulfill its mission.

[REDACTED] alleged that on at least five occasions in June and July 2020, [REDACTED] and [REDACTED], prevented the DAU from responding to emergency calls at the direction of [REDACTED]

These incidents included a July 2020 911 call received by the DAU relaying assistance needed for an “alien in distress.” The individual was severely dehydrated, but able to provide his age and describe his clothing. The DAU, which was available and ready to respond, requested permission to conduct a search by air for the individual. alleged that , the Command Duty Officer (CDO), denied the request at direction. asserted that the DAU could have located the individual within a short period of time, but without air support, the individual was not located and was found dead the next day. In a second incident in June 2020, an emergency call went out for a CBP agent who was in distress. At the time of the call, the agent was receiving CPR from his colleagues. Although the DAU was closest to the incident, the CDO, who was under the supervision of instead requested air support from the El Paso unit, which was an additional hour away, with a pilot who was unfamiliar with the area. Consequently, the El Paso unit landed approximately 40 minutes from the distressed CBP agent’s location, however, the agent had died by the time first responders arrived on scene.

further alleged that on April 25, 2019, piloted a helicopter from El Paso to Deming Air Force Base (Deming), in violation of agency regulations governing authorized use of government aircraft.¹ Specifically, alleged that requested use of the helicopter to travel to Deming to “dispel rumors” among DAU mechanics about the closure of the facility, which was not an authorized use.² During return flight from this questionable mission, the DAU received notification that individuals transporting possible contraband were identified near the border. The closest aircraft to the individuals could not maintain radio communications with the DAU to receive the individuals’ coordinates, so the DAU requested that relay the coordinates to the available aircraft. Instead, elected, without required authorization, to respond to the call. As he was unfamiliar with the helicopter’s GPS, was not able to enter the coordinates of the location and piloted the aircraft into restricted airspace, nearly causing a catastrophic accident.³

alleged that following this incident, assigned his subordinates to conduct a review of his actions, which described as “cursory at best.” The report of that review stated that because the Federal Aviation Administration (FAA) had assessed the incident and determined not to act, DHS would not take any action. However, alleged that FAA neither received nor reviewed the incident and that the statement is a fabrication made in violation of agency policy.

¹ 1 C.F.R. § 301-70.801.

² Use of a government aircraft is generally authorized when commercial options are not available or for required-use situations, such as emergencies or when a specific communications or security needs arise.

³ The restricted airspace protects the Deming Tethered Aerostat Radar System site, which houses a tethered aerostat radar system—an airborne ground surveillance system that uses moored balloons tethered to the ground by multiple steel cables. The cables are not visible to pilots and pose a fatal threat to helicopters if they clip the cables in the air.

██████████ also alleged that ██████████ regularly approved aircraft for questionable uses. For example, he disclosed that within the six months leading up to OSC's referral, ██████████ repeatedly directed employees to travel by helicopter to complete firearms training at a shooting range three hours from Deming. Previously, employees completed training at a local range at no cost, an option that is still available. ██████████ alleged that there is no operational or other compelling need to approve air travel to visit a range three hours away. Finally, ██████████ alleged that the actions of AMO officials, including ██████████, effectively idled the DAU, which prevented the DAU from fulfilling its mission, placing the public and CBP agents at risk.

The Agency Reports

The investigation did not substantiate the majority of the allegations. After reviewing interviews from management regarding the incidents resulting in deaths, the agency determined there was "no evidence to support that ██████████, ██████████, and ██████████ prevented the DAU from responding to emergency calls, resulting in deaths." In large part, the agency concluded that ██████████ was not responsible for the fatal incidents because while he operates "at a management level above the CDO in the normal chain of command, he is not routinely consulted with or involved in the immediate decision-making determinations by the CDO regarding requests for air support." Regarding ██████████ disclosure related to an undocumented noncitizen death, the agency determined that ██████████, without "knowledge or collaboration" from ██████████, his supervisor, was the CDO responsible for each specific incident, and that ██████████ decisions, as he described in investigative interviews, were based on a "myriad [of] variables" warranting consideration, including competing interests such as consideration of schedule flights," and "flight hours to the areas that [CBP] has set as a priority and AMO [was] required to fulfill..."

In addition, the report found that ██████████' decision to mobilize the El Paso Crew instead of the DAU in response to the emergency call involving the CPB agent was based on a mistaken belief that the DAU crew had not met mandatory rest requirements.⁴ The agency determined, however, that ██████████' error did not ultimately make a difference in timing leading to the CBP agent's death, noting that "[t]he time required for DAU employees to respond to the airport from their residences would have likely negated any possible time savings because the [El Paso] crew was already on duty at the airport," and that ultimately, taking multiple variables into account, the projected time of arrival for the helicopter out of the DAU would have been "within approximately five to 20 minutes" of the actual arrival of the El Paso crew. The agency also determined that the type and capability of the DAU's only available aircraft at the time of the call would have made a lifesaving mission "challenging."

⁴ The agency report stated that contrary to Mr. ██████████ belief, the DAU crew had met rest requirements.

The agency partially substantiated [REDACTED] allegation regarding the April 25, 2019 incident, conceding that while [REDACTED] entered restricted airspace, he did so inadvertently and exited the airspace “almost immediately.” The agency did not determine that [REDACTED] mission in this incident was questionable. Specifically, the agency determined the mission was “administrative,” and intended as an “area familiarization flight,” and it was only upon re-fueling on the return trip that [REDACTED] “...took the opportunity to meet with employees there” to dispel rumors the DAU was closing. The agency further determined that the helicopter’s system requires that the pilot must adequately set the GPS with the appropriate layers. While the agency found that [REDACTED] did not complete this step, it did not substantiate that he deliberately turned off the helicopter’s transponder during this mission.⁵ The agency also found that following the incident, AMO management promptly investigated the matter and “took remedial action against [REDACTED].” The agency further noted that steps were taken to ensure that similar GPS mishaps do not recur.⁶ The agency did not substantiate that the FAA failed to review the incident, noting that the FAA conducted a review, but deferred to CBP’s assessment.

The agency substantiated that the AMO tasked [REDACTED], [REDACTED] direct subordinate, with conducting the internal review of the April 25, 2019 incident.⁷ The agency noted that “although the administrative inquiry appeared to be thorough and accurate, the mere appearance of a subordinate conducting an administrative inquiry on their supervisor is *inherently flawed*,” (emphasis added), and violates Policy No. 400.10 v. A.⁸ Accordingly, the agency recommended that AMO Southwest Region review existing procedures to ensure that going forward, any local administrative inquiries are conducted by individuals outside the region, and that the investigators are “of equal or higher rank” than the subject officials.

The agency did not substantiate that officials frequently approve the use of aircraft for questionable purposes. Rather, the agency found that all instances of non-enforcement flights [REDACTED] specifically cited were “conceivably relatable to required training, proficiency and

⁵ The agency’s determination was based on an assessment by Supervisory Domain Awareness Officer [REDACTED], who opined that based on observations of “radar hits,” that the 20-minute loss of transponder activity (radar hits) was most probably the result of “terrain and elevation,” and not a purposeful deactivation of the transponder.

⁶ The agency installed a newer system in the aircraft which would allow the transponder to log and communicate the aircraft flight status.

⁷ [REDACTED] review noted that the incident revealed some “training and administrative shortfalls,” and determined that [REDACTED] deviated from proper procedure by not re-briefing the change in mission with the Clearance Authority pursuant to the AOH Sections 3.3.2.A.2. Based on these findings, [REDACTED] recommended that [REDACTED] review applicable Federal Aviation Regulations and issued him a letter of counseling.

⁸ Air And Marine Operations, Policy Number 400.10, Version A, January 30, 2017, “Management Inquiries.” In relevant part, the policy states that “the field director and Fact Finder assigned to [Management Inquiry Team] *will be drawn from outside the region and directorate where the event occurred...*” (emphasis added).

currency flights, or initial operator experience.” The report further noted that the investigation did not identify any instances of classification of flights as “transportation only” or taken “solely to avoid driving,” as ██████████ alleged. Finally, the agency did not substantiate that management officials make decisions that hinder the DAU’s ability to achieve its mission. In particular, the agency noted, after interviewing leadership, including ██████████ and ██████████ that managers have different management styles and adjust and shift priorities at their discretion based on operational needs. The agency also noted, in line with interview responses from ██████████ and ██████████, that at the time of ██████████ allegations, ██████████ was in the midst of implementing management changes at the facility to a more unified CDO approach. Finally, the agency indicated there was no evidence that officials effectively idled the DAU.

OSC sought a supplemental report addressing whether the agency re-investigated, or planned to re-investigate, the April 25, 2019 incident involving ██████████ given the finding that the internal review was conducted by a subordinate, ██████████, in violation of agency policy. The agency responded that based on the Office of Professional Responsibility’s review of ██████████ findings, which appeared “accurate, and met the preponderance of the evidence standards,” it did not intend to re-investigate. The agency also noted that going forward, it has internal procedures in place to ensure similar internal investigations do not recur.

Through an additional supplemental report, OSC requested that the agency interview employees outside ██████████ management chain to determine who authored multiple records contained in the agency’s report that appeared to contradict the finding that ██████████ was not the decision maker over AMO for any of the incidents referenced in ██████████ disclosures. The agency interviewed additional employees, but as the incidents occurred over four years ago, many of the witnesses could not recall the details of the incidents and were not able to confirm who authored the records. The agency indicated that the records OSC highlighted and additional witness interviews did not alter its determination that there was no evidence to support that ██████████, through ██████████ and ██████████ prevented the DAU from responding to emergency calls as alleged by ██████████.

The Whistleblower Comments

██████████ expressed extreme dismay at the agency’s findings, noting that in the initial report the agency failed to seek input from employees other than the members of management he identified as engaging in wrongdoing, revealing an inherently biased “one-sided narrative” that “did not seek alternative viewpoints” on the allegations. ██████████ also asserted that the agency failed to consider or include in its findings any objective reports or other, non-biased information that would ensure a transparent, disinterested review of his allegations. ██████████ found it deeply concerning that the agency adopted no meaningful corrective action or accountability measures as to either ██████████ ██████████ for the April 25, 2019 incident.

The Special Counsel's Findings

After review, I remain concerned with the agency's findings regarding the degree to which the series of decisions to deny the DAU's ability to launch between June and August of 2020 were attributable to [REDACTED] direction. In particular, in a request for a second supplemental report, OSC asked the agency to reconcile documents and statements directly contradicting the agency's finding that [REDACTED] never ordered CDOs to deny DAU's requests to launch air support during the particular instances [REDACTED] cited.⁹ Despite the compelling nature of these documents and statements, the agency failed to acknowledge this contradiction and maintained that each denial of DAU's requests to launch was a decision by the assigned CDO alone.

OSC's intent in requesting a second supplemental report was to confront the agency with these apparently contradictory documents and to request interviews of several additional witnesses who might have knowledge of these contemporaneous records surrounding the 2020 DAU requests to launch. Other than providing additional statements from witnesses who could not recall authoring the records, the agency's second supplemental response did little to clarify its findings. Instead, the agency maintained that "a thorough and comprehensive review" of the allegations "did not find any evidence that DAO [REDACTED] made any decisions, or instructed anyone else, to purposefully minimize [the DAU]." Based on the foregoing, I have concluded that the agency's findings do not appear reasonable.

⁹ The contradictory information OSC obtained was from two sources: the first source was a series of "DAU Operations Notes," dated July 14th and July 15th, respectively, provided by [REDACTED] attached to the agency report as "Exhibit 4." These operations notes, which the majority of witnesses conceded were official documents and written contemporaneously with each shift, contained the following record: "Request to launch on search and rescue of alien in distress denied by [REDACTED], per [Director of Air Operations ([REDACTED]]." The second source was the September 9, 2021 interrogatory of an AMO employee, obtained during the investigation of a related retaliation case involving [REDACTED] reviewed by OSC's Investigation and Prosecution Division. In this interrogatory, the witness stated that the "Deming Supervisor," presumably [REDACTED], assigns crews and destination assignments, and that per the "Deming Supervisor," the DAU was to be assigned to patrol in Arizona. However, throughout the agency's reports, this same employee consistently maintained that he, as CDO, was solely in charge of decisions concerning when and where the DAU would launch and that these decisions were not those of [REDACTED]

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As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, the agency reports, and whistleblower comments to the Chairs and Ranking Members of the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Homeland Security. I have also filed redacted copies of this letter, the agency reports, and the redacted referral letter in our public file,¹⁰ which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Hampton Dellinger
Special Counsel

Enclosures

cc: Troy A. Miller, Senior Official Performing the Duties of the Commissioner, CBP

¹⁰ Mr. Chandler did not consent to the inclusion of his comments in the public file.