

U.S. OFFICE OF SPECIAL COUNSEL 1730 M Street, N.W., Suite 300 Washington, D.C. 20036-4505

September 10, 2020

The Honorable Chad F. Wolf Acting Secretary Department of Homeland Security 245 Murray Lane, S.W., Building 410 Washington, D.C. 2052-0075

Re: OSC File No. DI-20-001009

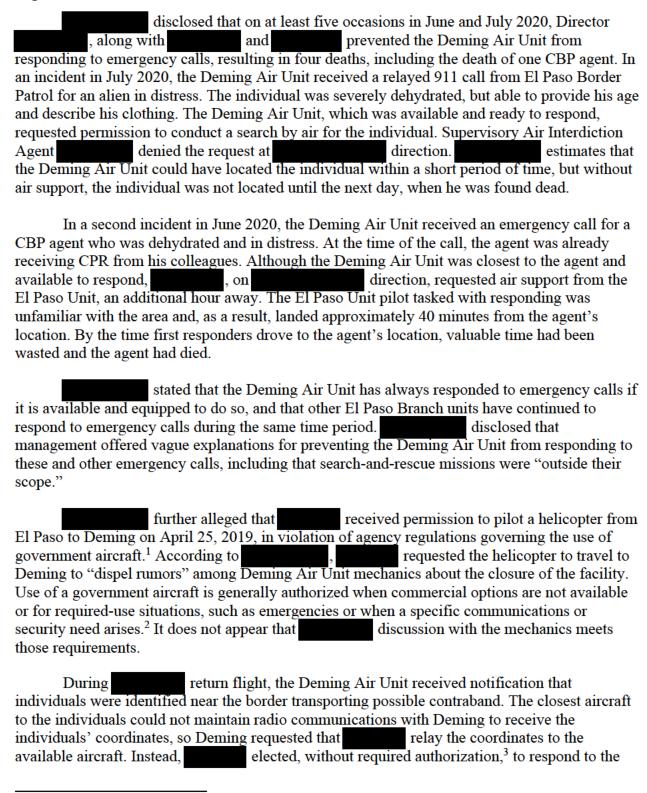
Referral for Investigation--5 U.S.C. § 1213(c)

Dear Mr. Secretary:

I am referring to you for investigation whistleblower disclosures concerning officials at the Department of Homeland Security (DHS), Customs and Border Protection (CBP), Air and Marine Operations (AMO), El Paso Air Branch, Deming Air Unit, El Paso, Texas. The whistleblower alleged that CBP officials may have engaged in conduct that constitutes a violation of law, rule, or regulation; gross mismanagement; an abuse of authority; and a substantial and specific danger to public safety. A report of your investigation on these allegations and any related matters is due to the Office of Special Counsel (OSC) on November 9, 2020.

, a Supervisory Air Interdiction Agent, who consented to the release of his name, disclosed that CBP officials in El Paso who oversee the CBP Deming Air Unit in Deming, New Mexico, failed to fulfill their duty to ensure the safety and security of the public. The allegations to be investigated include:

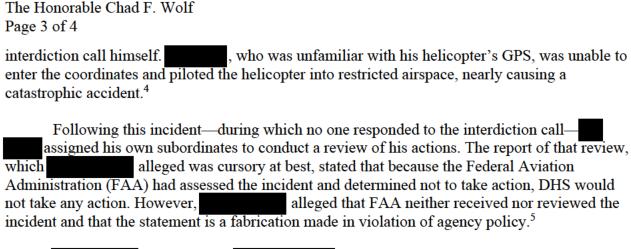
- Director of Air Operations , Command Duty Officer and Supervisory Air Interdiction Agent repeatedly prevented the Deming Air Unit from responding to emergency calls, resulting in several deaths;
- Former Acting Director of Air Operations piloted a helicopter flight into restricted airspace during an unapproved change in mission;
- Former Acting Director subordinates conducted a cursory review of his unauthorized flight actions culminating in a report containing false statements, in violation of agency policy;
- Agency officials frequently approve the use of aircraft for questionable purposes; and,
- Agency officials have made a series of management decisions that hinder the Deming Air Unit's ability to achieve its mission.



¹41 C.F.R. § 301-70.801.

²Id. § 301-70.801(b). Mr. Chandler also noted that the door-to-door flight time was one hour; driving takes approximately 45 additional minutes.

³"In an emergency situation, prior verbal approval for required-use travel with an after-the-fact written authorization is permitted." 41 C.F.R. § 301-10.262(a), Note.



disclosed that frequently approves aircraft for questionable uses. For example, let disclosed that within the last six months, 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. According to switched ranges to "standardize training," but noted that the same instructors complete the training regardless of what range they attend. In alleged that there is no operational or other compelling need to approve air travel to visit a range three hours away, and that approval to do so violates agency policy.

Finally, alleged that the actions of AMO officials, including have effectively idled the Deming Air Unit. For example, restricted the Deming Air Unit to emergency call-outs only—although as described above, even emergency responses have been prohibited. then transferred the Deming aircraft to El Paso for repairs that could have been completed locally, leaving the Deming Air Unit with no aircraft for over 15 days in August 2020. alleged that these decisions prevent the Deming Air Unit from fulfilling its mission by, among other things, carrying out timesensitive interdiction activities and emergency responses, placing the public, including CBP agents, at risk.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation; gross mismanagement; an abuse of authority; and a substantial and specific danger to public safety. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency

⁴The restricted airspace protects the Deming TARS 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.

⁵"Employees will not knowingly make false, misleading, incomplete, or ambiguous statements, whether oral or written, in connection with any matter of official interest." CBP Directive No. 51735-013A, *Standards of Conduct*, para. 6.4.1 (March 13, 2012).

⁶41 C.F.R. § 301-70.801(b).

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report along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at https://osc.gov/Pages/DOW.aspx. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. §1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov.

Sincerely,

Henry J. Kerner Special Counsel

Enclosure

cc: The Honorable Joseph V. Cuffari, Inspector General

APPENDIX AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: https://osc.gov/Pages/Resources-PublicFiles.aspx. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).