



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

March 29, 2021

The Honorable Pete Buttigieg
Secretary
Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: OSC File No. DI-21-000339
Referral for Investigation—5 U.S.C. §1213(c)

Dear Secretary Buttigieg:

I am referring to you for investigation a whistleblower disclosure that employees at the Department of Transportation (DOT), Federal Railroad Administration (FRA), Washington, D.C., engaged in conduct that may constitute a violation of law, rule, or regulation and an abuse of authority. A report of your investigation in response to the allegations and any related matters is due to the Office of Special Counsel (OSC) on May 28, 2021.

The whistleblower, who chose to remain anonymous, alleged FRA officials are violating federal locality pay regulations 5 C.F.R. §§ 531.604-531.605 by knowingly permitting employees to receive pay at a rate different than the rate established for the employees' worksite. The whistleblower further alleged that these same officials have allowed employees to avoid agency drug testing screenings in violation of 49 C.F.R. § 219 Subpart G. The allegations to be investigated include:

- FRA employees [REDACTED] improperly receive locality pay for DOT headquarters, but permanently telework outside of the designated region for the locality pay;
- FRA officials, including FRA Director of Human Resources [REDACTED], Motive Power and Equipment Division Staff Director [REDACTED], and Chief Safety Officer [REDACTED] are aware the incorrect locality pay rate is being used but have not taken steps to correct the agency personnel systems;
- FRA officials, including [REDACTED] and Supervisor for Departmental Drug Office [REDACTED] circumvent FRA drug testing regulations by failing to require the FRA employees who permanently telework outside the locality area to appear for drug testing; and
- [REDACTED] misled drug testing technicians about the availability of the teleworking employees for testing on multiple occasions between 2016 and 2020.

The whistleblower explained that, in 2016, FRA allowed several employees to telework full-time without requiring those employees to return to the office. However, the designated worksites for the employees were not revised in DOT's personnel systems. Employees who originally worked at

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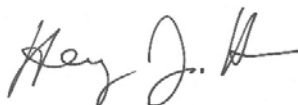
DOT headquarters began teleworking outside the local area: ██████████ in Rochester, New York, ██████████ in Paramus, New Jersey, and ██████████ in East Stroudsburg, Pennsylvania. However, these employees listed Washington, D.C. as their designated worksite even though they did not report to headquarters offices on a regular basis. Because their worksites were not revised in DOT's personnel systems, the employees continued to receive a salary based on the Office of Personnel Management locality pay table for Washington, D.C.

The whistleblower also alleged that the employees who telework farther than three hours from DOT's headquarters are not subject to drug testing. The whistleblower explained that a drug tester comes to headquarters at least once a year. The drug tester provides managers a randomly selected list of approximately 20 employees to be tested (along with 20 alternates). The whistleblower explained that employees who are teleworking must still report for testing if they are within three hours of the testing location. If an employee is unavailable for testing, that employee's name is taken off the list and an alternate is added. The whistleblower explained that if an employee is teleworking more than three hours away from DOT headquarters, but listed DOT headquarters as their designated worksite and are on the drug testing list, then ██████████ falsely tells the drug tester that the employees are on leave or official travel instead of requiring them to come to headquarters for testing. Consequently, the teleworking employees are effectively removed from the list of employees subject to drug testing and the agency is not in compliance with FRA regulations, 49 C.F.R. § 219 Subpart G. The whistleblower contends that ██████████ are aware of this potential noncompliance but continue to permit these teleworking employees to avoid drug testing.

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 is a violation of law, rule, or regulation and an abuse of authority. 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 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 section 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Respectfully,



Henry J. Kerner
Special Counsel

cc: The Honorable Eric J. Soskin, 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/PublicFiles>. 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).