

OFFICE OF THE GENERAL COUNSEL

1200 New Jersey Ave., S.E. Washington, D.C. 20590

Office of the Secretary of Transportation

August 2, 2024

The Honorable Hampton Dellinger Special Counsel U.S. Office of Special Counsel 1730 M Street NW, Suite 218 Washington, DC 20036

Re: OSC File No. DI-21-000339

Dear Mr. Dellinger:

By letter dated March 29, 2021, the Special Counsel (then Henry J. Kerner) referred for investigation a whistleblower's allegation that Federal Railroad Administration (FRA) officials knowingly violated federal regulations by permitting FRA employees to receive pay at a rate different from the rate established for their worksites. The whistleblower also alleged that FRA officials allowed permanent teleworkers (which FRA refers to as "remote workers") to avoid required drug testing screenings. The referral required the U.S. Department of Transportation (DOT) to investigate these issues.

The Secretary of Transportation has delegated responsibility for matters falling under 5 U.S.C. Section 1213(d) to the General Counsel. The Department's Office of the Assistant Secretary for Administration prepared the Report of Investigation (ROI) in this matter. I enclose the ROI with this letter.

The investigation partially substantiated the allegations related to pay rates. For two of the three FRA employees involved, the investigation found that their telework arrangements did not comply with Office of Personnel Management (OPM) regulations, in that they failed to require each employee to spend at least two days per pay period at their official worksite in Washington, DC (DOT Headquarters). Rather, the arrangements required each employee to spend an entire week at DOT Headquarters every other pay period. Although this resulted in more total time required at the Headquarters building, the arrangements violated OPM regulations and have been corrected. The employees have been converted to remote workers, and their pay rates now correspond to their respective worksites in Upstate New York and New Jersey. According to the investigation, neither employee worked remotely full time during the relevant time period and the arrangements were not an attempt to violate OPM regulations. As for the third employee, the investigation uncovered potential wrongdoing on the part of the employee to obtain a higher pay rate, and resulted in a referral to DOT's Office of Inspector General. The FRA employee ultimately pleaded guilty to theft of government property.

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The investigation did not substantiate the allegations related to drug testing avoidance.

As a result of the investigation, FRA has corrected two employees' work arrangements to conform to OPM regulations and is preparing additional training for FRA managers on telework arrangements and their impact on locality pay. The investigation also uncovered the third FRA employee's misconduct as described in the enclosed report, and the FRA is taking appropriate administrative action.

We have appreciated the opportunity to review this important matter and the whistleblower's diligence in raising concerns.

Sincerely,

Subash Iyer

Acting General Counsel

Enclosure

Office of the Assistant Secretary for Administration Report of Investigation

In response to:

U.S. Office of Special Counsel (OSC)

File DI-21-000339

August 2, 2024

Executive Summary

The Assistant Secretary for Administration of the U.S. Department of Transportation (DOT) was delegated responsibility to investigate a U.S. Office of Special Counsel (OSC) whistleblower disclosure (OSC File No. DI-21-000339) referred to DOT on March 29, 2021. The Assistant Secretary's Office has conducted that administrative investigation and completed this report.

The anonymous whistleblower alleged that from 2016 through 2020 (i.e., the relevant time period), Federal Railroad Administration (FRA) officials violated Office of Personnel Management (OPM) locality pay regulations at 5 CFR §§ 531.604-531.605 by knowingly permitting employees to improperly receive locality pay for Washington, DC, even though the employees permanently teleworked outside of the Washington, DC locality pay area, and that these same FRA officials permitted the employees to avoid agency drug testing screenings in violation of 49 CFR § 219, Subpart G. ¹

The whistleblower specifically alleged that: (1) three named FRA employees –
Engineer #1, Engineer #2, and Technical Specialist
(Technical Specialist) – improperly received locality pay for DOT headquarters (HQ) in
Washington, DC, even though they permanently teleworked outside of the designated region for
the locality pay; (2) FRA officials, including
Staff Director), and
Officer (Officer), were aware the incorrect locality pay rate was being used, but did
not take steps to correct the relevant agency personnel systems; (3) FRA officials, including
Director, Staff Director, Officer, and Supervisor
(Supervisor),
circumvented FRA drug testing regulations by failing to require the FRA employees who
permanently teleworked outside the locality area to appear for drug testing; and (4)
Director misled drug testing technicians about the availability of the teleworking employees for
testing on multiple occasions between 2016 and 2020.

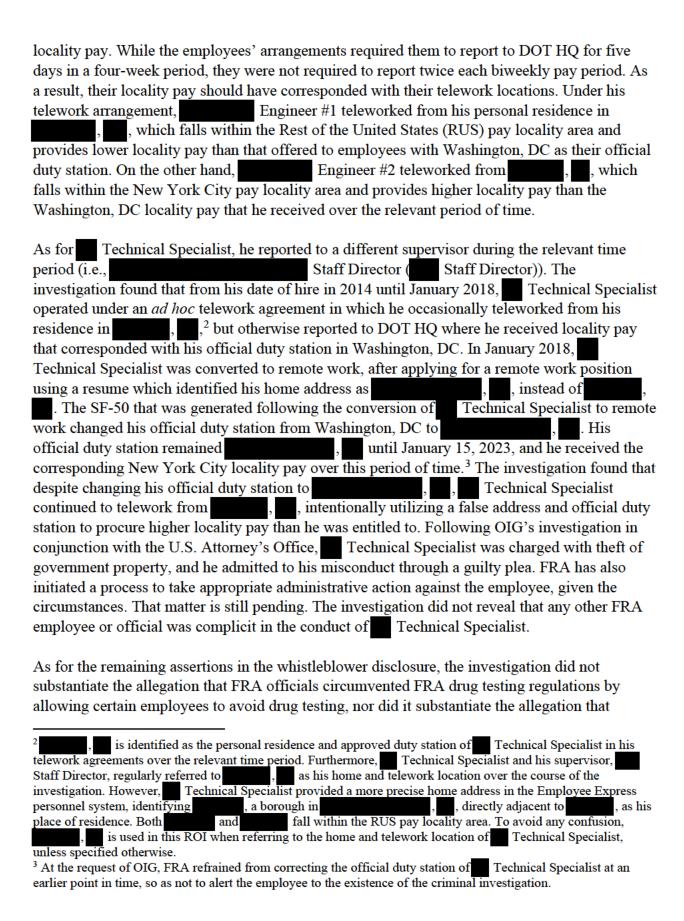
As a terminology matter, this report generally will refer to "remote work," as opposed to "permanent telework." Effective November 30, 2021, FRA adopted Order 3602, *Remote and Mobile Work Policy*, eschewing use of the term "fulltime telework" and defining work arrangements in which an employee is not expected to report to the agency's official location on a regular or recurring basis as "remote work." Because FRA uses the term "remote work," this report will as well.

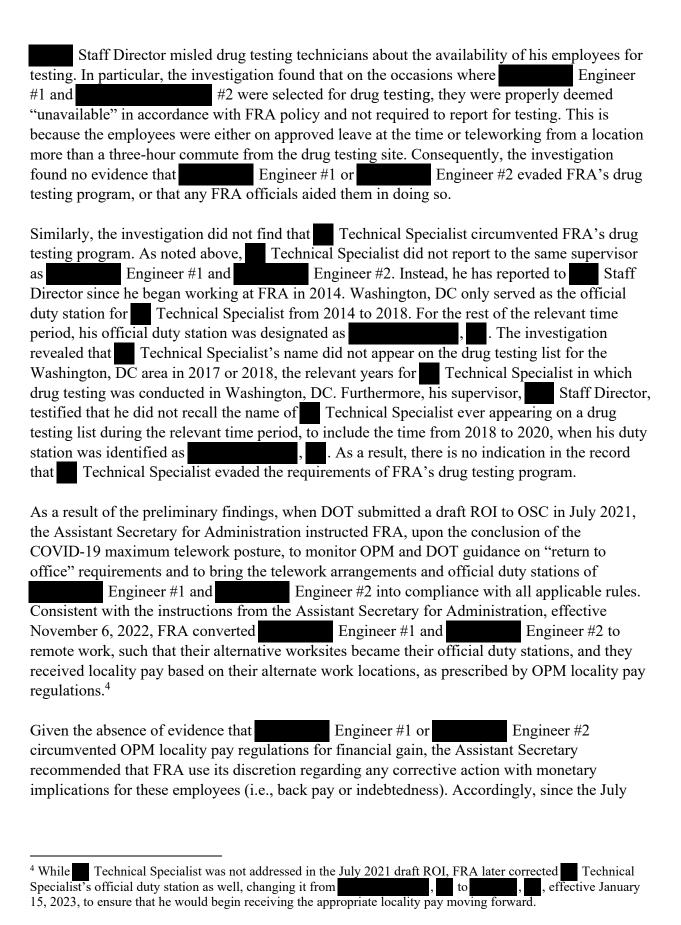
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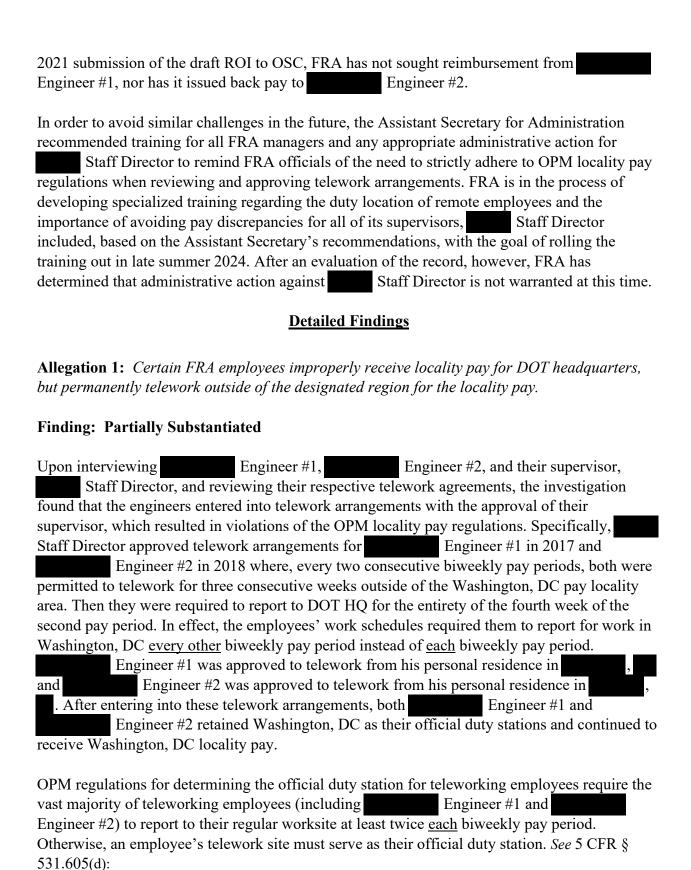
¹ 49 CFR § 219, Subpart G governs drug testing for the railroad industry and does not apply to the named employees. That error notwithstanding, FRA does have a drug testing program, as set forth in FRA Order 3700.5, dated March 30, 2006, which requires the named employees to be subject to random drug testing. Thus, the investigation sought to determine whether FRA officials and employees complied with the requirements of FRA's random drug testing program.

the General Counsel, initiated its investigation in April 2021. All witnesses, except for Technical Specialist, cooperated fully with the investigation, voluntarily disclosing information and documentation in response to the investigative team's requests. So as not to delay the portions of the administrative investigation that were unrelated to Technical Specialist, DOT provided OSC with a draft report of investigation (ROI) in July 2021 covering its draft findings and recommendations pertaining to Engineer #1 and Engineer #2. DOT now follows up with this final report.
As for Technical Specialist, the Office of the Assistant Secretary for Administration referred the relevant locality pay portion of the matter to the DOT Office of Inspector General (OIG) for investigation (including potential criminal investigation). In coordination with the U.S. Attorney's Office for the Middle District of Pennsylvania, OIG conducted its own investigation into the conduct of Technical Specialist. Following the completion of OIG's investigation, of August 4, 2023, Technical Specialist pleaded guilty in the U.S. District Court for the Middle District of Pennsylvania to one count of theft of government property. After Technical Specialist was sentenced on April 23, 2024, OIG provided the Office of the Assistant Secretary for Administration with a report of investigation detailing the findings from its criminal investigation on June 3, 2024. This ROI incorporates OIG's findings as to Technical Specialist's establishment of his duty station and the corresponding theft of government money.
DOT's investigation partially substantiated the allegation that certain FRA employees improperly received locality pay for DOT HQ while permanently teleworking outside of the Washington, DC pay locality area. However, the investigation did not find that FRA officials were aware that an incorrect locality pay rate was being used or that they knowingly failed to correct it. Rather, the investigation found that Engineer #1 and Engineer #2 entered into telework arrangements with the approval of their supervisor, Staff Director, and that the parties intended to comply with OPM locality pay regulations. Those arrangements permitted the employees over two consecutive biweekly pay periods (i.e., four weeks) to telework for three straight weeks outside of the Washington, DC pay locality area and then report to DOT HQ for one whole week. The employees were not permanently teleworking (i.e., "remote work") outside of the Washington, DC pay locality area, as alleged in the whistleblower disclosure. Nor was there evidence that their arrangements were entered into for nefarious reasons. To the contrary, the investigation found that the arrangements were entered into to allow the employees to deal with ongoing family matters outside of the Washington, DC area, and that the parties believed the arrangements complied with OPM regulations. The investigation did not find that any FRA officials were aware that Engineer #1 and Engineer #2 were receiving incorrect locality pay, such that they could have taken steps to correct the error.
Nevertheless, the investigation did find that the telework arrangements for Engineer #1 and Engineer #2 violated OPM regulations, which required the employees to report to DOT HQ at least twice each biweekly pay period in order to receive Washington, DC

The DOT Office of the Assistant Secretary for Administration, in consultation with the Office of







For an employee covered by a telework agreement, the following rules apply:

- (1) If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite [(i.e., official duty station)]. However, in the case of such an employee whose work location varies on a recurring basis, the employee need not work at least twice each biweekly pay period at the regular official worksite (where the employee's work activities are based) as long as the employee is regularly performing work within the locality pay area for that worksite.
- (2) An authorized agency official may make an exception to the twice-in-a-payperiod standard in paragraph (d)(1) of this section in appropriate situations of a temporary nature, such as the following:
 - (i) An employee is recovering from an injury or medical condition;
 - (ii) An employee is affected by an emergency situation, which temporarily prevents the employee from commuting to his or her regular official worksite;
 - (iii) An employee has an extended approved absence from work (e.g., paid leave);
 - (iv) An employee is in temporary duty travel status away from the official worksite; or
 - (v) An employee is temporarily detailed to work at a location other than a location covered by a telework agreement.
- (3) If an employee covered by a telework agreement does not meet the requirements of paragraphs (d)(1) or (d)(2) of this section, the employee's official worksite is the location of the employee's telework site.

Furthermore, an employee's locality pay is based on his or her official duty station as established
under 5 CFR § 531.605(d). See 5 CFR § 531.604(b). Because the telework arrangements for
Engineer #1 and Engineer #2 did not require them to report to DOT HQ
each biweekly pay period, the arrangements violated OPM locality pay regulations by permitting
them to maintain Washington, DC as their official duty stations and receive Washington, DC
locality pay. During the relevant time period, Engineer #1 received the higher
Washington, DC locality pay when he should have been receiving the lower RUS locality pay
associated with his residence in . On the other hand,
received the lower Washington, DC locality pay when he should have been receiving the higher
New York City locality pay associated with his residence in
Investigative interviews of Engineer #1, Engineer #2, and Staff
Director revealed that they did not intentionally violate OPM locality pay regulations. To the
contrary, each of these individuals believed the telework arrangements were in compliance with

OPM locality pay regulations since Engineer #1 and Engineer #2 were required to report to work in Washington, DC five days over two consecutive biweekly pay periods, which is *more* time in the office than an employee reporting just two days each biweekly pay period. The interviews also revealed that the telework arrangements were made for family reasons and work-life balance, not for financial gain. This finding was reinforced by testimony and email correspondence that demonstrated the two named employees unsuccessfully requested remote work arrangements at different times following the approval of their telework arrangements. Their efforts to become remote workers, which would have resulted in a change to their duty stations and locality pay, indicate that Engineer #1 and Engineer #2 did not have nefarious motives when they entered into their telework arrangements.

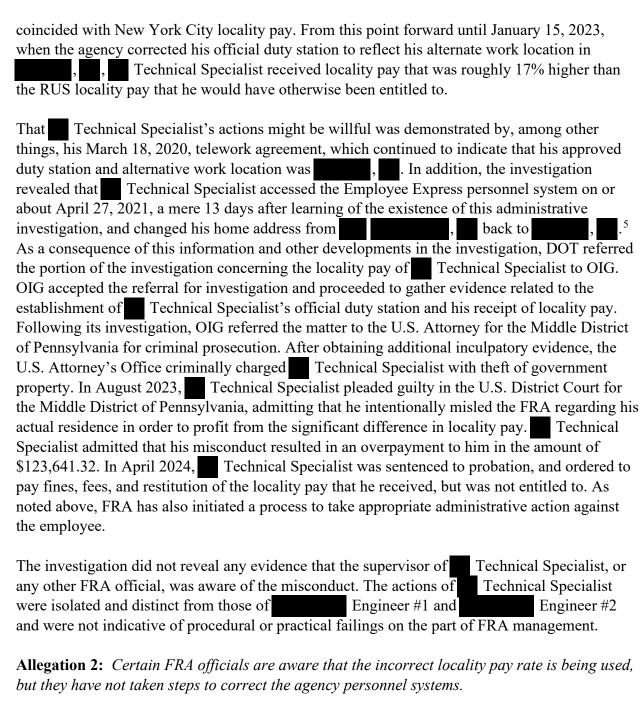
Finally, as indicated above, the investigation found that contrary to the whistleblower's allegation, neither of the two named employees was permitted to permanently telework (i.e., "remote work") outside of the Washington, DC pay locality area.

Based upon the interview statements, review of relevant personnel documents and policies, and OPM locality pay regulations, the allegation that certain FRA employees improperly received locality pay for DOT HQ is substantiated, but the allegation that these same employees permanently teleworked outside of the designated region for the locality pay is not substantiated. As a result, the allegation, taken as a whole, is partially substantiated.

As for Technical Specialist, he reported to a different supervisor during the relevant time
period (i.e., Staff Director). Staff Director indicated that Technical Specialist
worked under an ad hoc telework agreement shortly after he was hired by FRA in 2014 until
January 2018. The supervisor explained that during this time, Technical Specialist
occasionally teleworked from , but that he reported to DOT HQ on a regular basis.
Consistent with the supervisor's testimony, a June 6, 2017, telework agreement for
Specialist shows his approved duty station as Washington, DC, and his approved telework site as
his "[p]ersonal residence in" On or around June 23, 2017, Technical Specialist
changed his home address in the Employee Express personnel system to a UPS box in
, shortly after establishing it. In or around August 15, 2017, in email
correspondence, Staff Director encouraged Technical Specialist to apply for an
upcoming vacancy announcement which would allow him to work remotely while retaining his
job title and responsibilities. Staff Director noted in the email that Technical Specialist
"would lose a few bucks in locality pay," to which he replied, "Yes, I would like to do that." On
or around November 1, 2017, Technical Specialist applied for the remote work position in
response to the job announcement, which expressly referenced locality tables and locality pay.
Both on the resume and application he submitted in response to the job posting, Technical
Specialist listed his home address as the UPS box location in .
Effective January 21, 2018, Technical Specialist was selected and reassigned to the remote

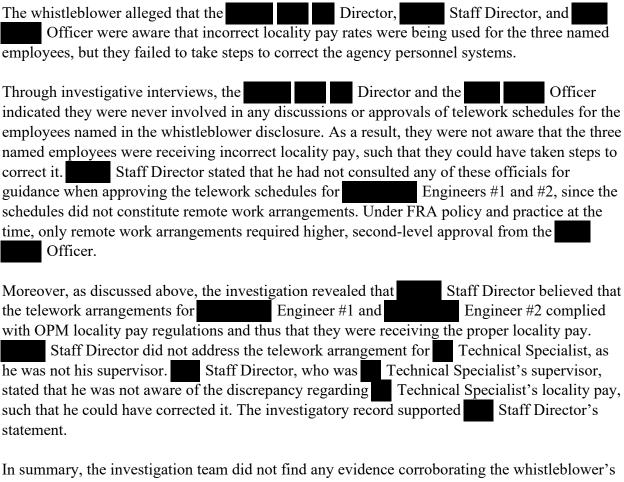
work position. His official duty station on the corresponding Standard Form 50 was recorded as

, and his salary included a locality-based payment of 32.13%, which



Finding: Not Substantiated

⁵ Changes to the home address of an employee in the Employee Express personnel system do not automatically trigger changes to the official duty station and locality pay of an employee. Technical Specialist did not take any affirmative steps outside of the Employee Express personnel system to correct his official duty station and locality pay. Those corrections were made by the agency.



In summary, the investigation team did not find any evidence corroborating the whistleblower's allegation that FRA officials had awareness that incorrect locality pay rates were being used and failed to take corrective action.

Allegation 3: Certain FRA officials circumvented FRA drug testing regulations by failing to require the FRA employees who permanently teleworked outside the locality area to appear for drug testing.

Finding: Not substantiated

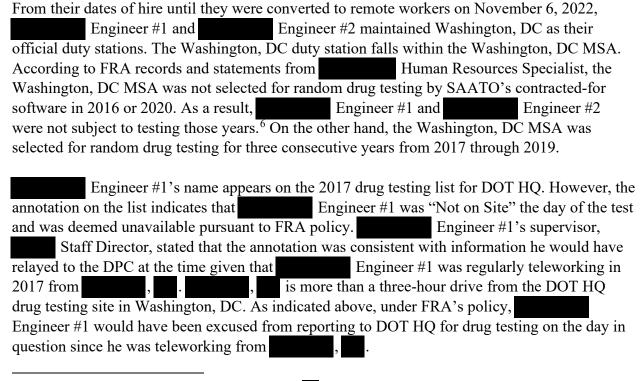
Engineer #1, Engineer #2, and Technical Specialist hold jobs that are classified as Testing Designated Positions (TDPs). As such, during the relevant timeframe (i.e., 2016 through 2020), the employees were subject to random drug testing under FRA's policy outlined in FRA Order 3700.5, dated March 30, 2006.

Under FRA's drug testing program, SAATO is responsible for selecting FRA employees for inclusion on drug testing lists. SAATO's selection process does not revolve around individual employees or their unique identifiers. Instead, it is based on the Metropolitan Statistical Area (MSA) within which an employee's official duty station falls. Specifically, SAATO utilizes contracted-for software to randomly designate MSAs for drug testing and to randomly select

employees whose official duty stations fall within the MSAs for inclusion on drug testing lists. In accordance with FRA policy, only those employees who appear on a drug testing list may be subject to random drug testing at a given time.

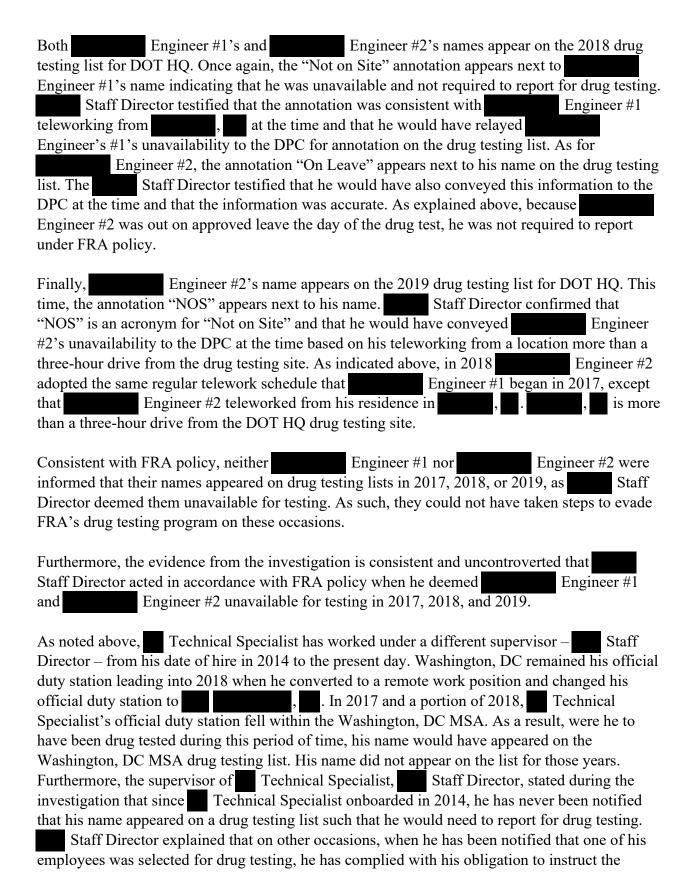
However, even where an employee appears on a drug testing list, FRA policy expressly excuses certain employees from random drug testing based on their availability on the date of the drug test. Specifically, employees who are on travel to or from a temporary duty station, on their regular day off (RDO), or on approved leave are not required to report for drug testing. Similarly, during the time period relevant to this referral, employees were not required to report for drug testing when their commute by car to the drug testing site would exceed three hours.

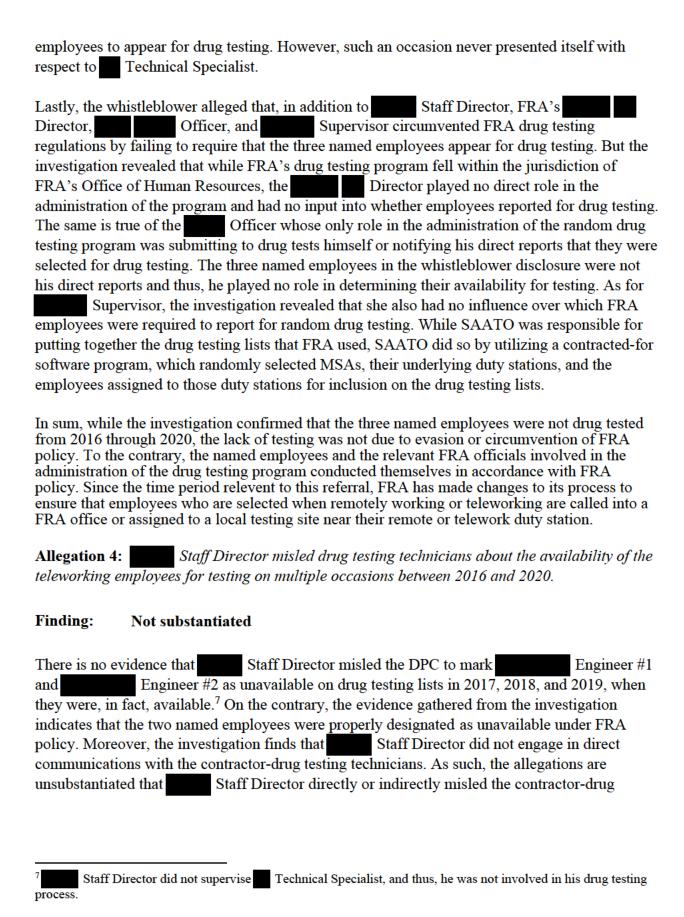
On the day of the drug test, the supervisor of the employees whose names appear on the drug testing list are responsible for informing the Drug Program Coordinator (DPC) whether an employee is available and if not, the reason why. If the employee is unavailable for a legitimate reason as prescribed by policy (e.g., leave, RDO, travel), the DPC will notify the contractor-drug testing technician and annotate the drug testing list. Significantly, in order to preserve the integrity of the drug testing program, supervisors are prohibited from disclosing an impending drug test to their employees until the day of the test. On the day of the test, supervisors notify their available employees that they have been selected and instruct them to report for drug testing. But, per FRA policy, the supervisor will only notify the employee that they have been selected for drug testing when the employee is deemed available for testing.



⁶ Washington, DC was also the official duty station of Technical Specialist in 2016, so he similarly would not have been subject to random drug testing that year as an employee stationed there.

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testing technicians about the availability of	Engineer #1 and	Engineer #2
for testing from 2016 through 2020.	<u>'</u>	

Actions Taken as a Result of the Investigation

As noted above, the Assistant Secretary for Administration instructed FRA, after it exited its
maximum telework posture under COVID-19, to bring the work schedules and official duty
stations of Engineer #1 and Engineer #2 into compliance with the OPM
locality pay regulations and any other applicable requirements. Furthermore, given the absence
of a nefarious motive on the part of the named employees involved and their supervisor's
approval of their work arrangements, the Assistant Secretary recommended that FRA use its
discretion regarding any potential indebtedness or entitlement to back pay arising out of
Engineer #1's and Engineer #2's receipt of the incorrect locality pay
over the relevant time period. Pursuant to the Assistant Secretary's instructions and
recommendations, FRA converted Engineer #1 and Engineer #2 to
remote workers, effective November 6, 2022, such that their alternative work locations became
their official duty stations. In addition, the employees began receiving locality pay at this time in
accordance with their alternate work locations, as prescribed by OPM regulations. To date, FRA
has refrained from pursuing reimbursement from Engineer #1 for the excess locality
pay that he received or from issuing backpay to Engineer #2, in accordance with the
recommendation of the Assistant Secretary for Administration.

Recommendations and Pending Actions

As a result of this investigation, the Assistant Secretary recommended that FRA provide training to its managers, and take any appropriate administrative action toward Staff Director, in order to reinforce the need for all officials to comply with OPM regulations and to seek guidance from the FRA Office of Human Resources when reviewing and approving work arrangements in which an employee is not required to report to their official duty station at least twice each biweekly pay period. In response, FRA embarked on an effort to develop mandatory training for all of its supervisors, Staff Director included, based on the recommendations provided by the Assistant Secretary. Specifically, FRA is planning to provide supervisory training regarding duty locations and remote work employees, and the importance of ensuring accuracy to prevent pay discrepancies. The training is currently in development with the first session slated to begin in August 2024, and biannual sessions planned for subsequent years. In addition, FRA is developing an informational email to all FRA supervisors regarding the importance of ensuring accurate duty locations, proper procedures to follow when employees request to change their duty locations, and a tasker to check the accuracy of the duty stations of all assigned employees. Finally, FRA is incorporating information regarding the importance of maintaining an accurate duty station into the materials presented to all new employees during their on-boarding process. In response to the recommendation to take any appropriate administrative action toward Staff Director, FRA reviewed the draft ROI submitted to OSC in July 2021 and determined that it did not substantiate misconduct on the part of Staff Director, such that administrative

action was warranted. Upon review of this final ROI, FRA will reevaluate whether administrative action is warranted.

Investigation Methodology

The investigation occurred by delegation from the General Counsel to the DOT Office of the Assistant Secretary for Administration, further delegated to the Departmental Office of Human Resource Management, Policy and Oversight Division, which conducted the investigation in consultation with the DOT Office of the General Counsel.

The investigative team analyzed personnel records and documents, agency policies, and telework agreements obtained from the FRA Office of Human Resources, along with random drug testing lists and policies from SAATO. The team also conducted qualitative interviews with individuals named in the whistleblower disclosure and other FRA officials to establish and corroborate facts.

Interviews were conducted with the following individuals:



With OSC's approval, the investigation was held in abeyance from September 2021 to April 2024, to permit OIG to conduct its investigation of the allegations related to Technical Specialist, as explained above. On June 3, 2024, OIG provided the DOT Office of the Assistant Secretary for Administration with a report detailing the findings of OIG's criminal investigation. The Office of the Assistant Secretary for Administration now relies on OIG's report to supplement and finalize the draft ROI originally submitted to OSC in July 2021. This ROI incorporates OIG's findings as to Technical Specialist and addresses the allegations in the whistleblower disclosure as to all three named employees.

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⁸ Refer to Appendix A for Index of Names.