



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

July 26, 2018

The Honorable Elaine Chao
Secretary
Department of Transportation
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

Re: OSC File No. DI-18-2058
Referral for Investigation—5 U.S.C. § 1213(c)

Dear Secretary Chao:

I am referring to you for investigation a whistleblower disclosure that employees at the Department of Transportation, Federal Aviation Administration (FAA), engaged in actions that constitute a violation of law, rule or regulation; gross mismanagement; and a gross waste of funds. A report of your investigation and any related matters is due to the Office of Special Counsel on September 24, 2018.

The whistleblower, who chose to remain anonymous, disclosed that the International Program Division (AFS-50), a policy division of the FAA, has engaged in a pattern of unilaterally waiving pay, compensation, and benefits (PC&B) costs when charging foreign civil aviation authorities to host FAA international training events such as Government Safety Inspection (GSI) courses. The specific allegations include the following:

- AFS-50 officials have unilaterally waived PC&B costs when teaching overseas courses in Singapore, Ghana, Nigeria, Kenya, and Mongolia, none of which are funded through appropriations and thus must be recouped from the requesting country;
- These unilateral waivers represent violations of the Antideficiency Act, codified at 13 U.S.C. § 1341, 49 U.S.C. § 40113(e), and FAA Order 2100.16(3)(a) ¹;

¹ The Antideficiency Act prohibits government expenditures in excess of amounts available through appropriations. FAA Order 2100.16(3)(a) notes that the "FAA must seek reimbursement for the cost of providing such training," and that an "Administrator" has only "limited authority" to waive reimbursement." To that end, 49 U.S.C. § 40113(e)(2) reiterates the need for the "Administrator" to "actively seek reimbursement for services provided" and provides no allowance for unilateral waivers of reimbursement.

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- These unilateral waivers represent a failure to collect thousands of dollars in government funds;
- AFS-50 leadership has been nonresponsive to concerns regarding the practice of failing to obtain PC&B waivers when the same GSI courses could be handled by a non-policy division of the FAA using a reimbursement structure, at no cost to taxpayers.

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, and a gross waste of funds. 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 for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Calvin L. Scovel, III

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).