



**U.S. OFFICE OF SPECIAL COUNSEL**  
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**The Special Counsel**

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.

██████████ disclosed that on at least five occasions in June and July 2020, Director ██████████, along with ██████████ and ██████████ prevented the Deming Air Unit from responding to emergency calls, resulting in four deaths, including the death of one CBP agent. In an incident in July 2020, the Deming Air Unit received a relayed 911 call from El Paso Border Patrol for an alien in distress. The individual was severely dehydrated, but able to provide his age and describe his clothing. The Deming Air Unit, which was available and ready to respond, requested permission to conduct a search by air for the individual. Supervisory Air Interdiction Agent ██████████ denied the request at ██████████ direction. ██████████ estimates that the Deming Air Unit could have located the individual within a short period of time, but without air support, the individual was not located until the next day, when he was found dead.

In a second incident in June 2020, the Deming Air Unit received an emergency call for a CBP agent who was dehydrated and in distress. At the time of the call, the agent was already receiving CPR from his colleagues. Although the Deming Air Unit was closest to the agent and available to respond, ██████████, on ██████████ direction, requested air support from the El Paso Unit, an additional hour away. The El Paso Unit pilot tasked with responding was unfamiliar with the area and, as a result, landed approximately 40 minutes from the agent's location. By the time first responders drove to the agent's location, valuable time had been wasted and the agent had died.

██████████ stated that the Deming Air Unit has always responded to emergency calls if it is available and equipped to do so, and that other El Paso Branch units have continued to respond to emergency calls during the same time period. ██████████ disclosed that management offered vague explanations for preventing the Deming Air Unit from responding to these and other emergency calls, including that search-and-rescue missions were "outside their scope."

██████████ further alleged that ██████████ received permission to pilot a helicopter from El Paso to Deming on April 25, 2019, in violation of agency regulations governing the use of government aircraft.<sup>1</sup> According to ██████████, ██████████ requested the helicopter to travel to Deming to "dispel rumors" among Deming Air Unit mechanics about the closure of the facility. 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 need arises.<sup>2</sup> It does not appear that ██████████ discussion with the mechanics meets those requirements.

During ██████████ return flight, the Deming Air Unit received notification that individuals were identified near the border transporting possible contraband. The closest aircraft to the individuals could not maintain radio communications with Deming to receive the individuals' coordinates, so Deming requested that ██████████ relay the coordinates to the available aircraft. Instead, ██████████ elected, without required authorization,<sup>3</sup> to respond to the

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<sup>1</sup>41 C.F.R. § 301-70.801.

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

<sup>3</sup>"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.

interdiction call himself. [REDACTED], who was unfamiliar with his helicopter's GPS, was unable to enter the coordinates and piloted the helicopter into restricted airspace, nearly causing a catastrophic accident.<sup>4</sup>

Following this incident—during which no one responded to the interdiction call—[REDACTED] assigned his own subordinates to conduct a review of his actions. The report of that review, which [REDACTED] alleged was cursory at best, stated that because the Federal Aviation Administration (FAA) had assessed the incident and determined not to take action, DHS would not take any action. However, [REDACTED] alleged that FAA neither received nor reviewed the incident and that the statement is a fabrication made in violation of agency policy.<sup>5</sup>

[REDACTED] disclosed that [REDACTED] frequently approves aircraft for questionable uses. For example, [REDACTED] disclosed that within the last six months, [REDACTED] has 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 [REDACTED], officials stated that they switched ranges to “standardize training,” but [REDACTED] noted that the same instructors complete the training regardless of what range they attend. [REDACTED] 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.<sup>6</sup>

Finally, [REDACTED] alleged that the actions of AMO officials, including [REDACTED] have effectively idled the Deming Air Unit. For example, [REDACTED] restricted the Deming Air Unit to emergency call-outs only—although as described above, even emergency responses have been prohibited. [REDACTED] 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. [REDACTED] alleged that these decisions prevent the Deming Air Unit from fulfilling its mission by, among other things, carrying out time-sensitive 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

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<sup>4</sup>The 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.

<sup>5</sup>“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).

<sup>6</sup>41 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](mailto:cmcmullen@osc.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Henry J. Kerner". The signature is fluid and cursive, with a prominent initial "H" and "K".

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).