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September 7, 2010

The President
The White House
Washington, D.C. 20500

Re: OSC File Nos. DI-07-2471 and DI-08-1015

Dear Mr. President:

The Office of Special Counsel (OSC) received a report from the Honorable Ray LaHood, Secretary of the Department of Transportation (DOT), on December 14, 2009, in response to a request for investigation sent to the Secretary from this office pursuant to 5 U.S.C. § 1213(c) and (d). The report is the Secretary's response to information disclosed that established that there was a substantial likelihood Federal Aviation Administration (FAA) officials had violated a law, rule or regulation and were engaged in conduct that constituted gross mismanagement and created a substantial and specific danger to public health and safety. The disclosures were received from Peter D. Nesbitt and Geoffrey D. Weiss, Air Traffic Controllers (ATCs), at Memphis International Airport (Memphis Airport), Memphis, Tennessee.¹ As required by 5 U.S.C. § 1213(e)(3), OSC is transmitting the Secretary's report to you.

Mr. Nesbitt and Mr. Weiss (the whistleblowers), who consented to the release of their names, disclosed a number of issues involving the safety of aviation traffic at Memphis Airport. They alleged that the management of air traffic on Runway 27, which runs perpendicular to the facility's three other runways, created significant safety concerns for aircraft executing go-around or missed approach maneuvers, and that the Taxi-into-Position-and-Hold rules contribute to go-arounds on Runway 27. They also alleged that, on more than one occasion, a supervisor prevented an ATC from correcting an impending loss of separation between aircraft on approach. The whistleblowers disclosed that ATCs lack training on the high volume and complexities of air traffic on Runway 27, Memphis Airport's surface radar system is not certified for Runway 27, ATCs do not notify pilots each time they enter and exit Class B airspace as required by FAA Order JO 7110.65, the glare on radar scopes can interfere with ATCs ability to perform their duties, and that aircraft are regularly permitted to exceed the limitations on tailwind speeds.

Mr. Nesbitt's disclosures were initially referred to the Honorable Mary E. Peters, then-DOT Secretary, in October 2007, who tasked FAA with investigating the allegations. FAA provided its report to OSC on December 3, 2007, and a supplemental report on December 21,

¹Mr. Nesbitt is now an ATC in Austin, Texas, and Mr. Weiss is now an ATC in Jacksonville, Florida.

2007. Amid concerns of possible conflict of interest with FAA's investigation, and because the reports were not fully responsive, Mr. Nesbitt's disclosures were referred to then-Secretary Peters for an additional review on September 19, 2008, along with allegations received from Mr. Weiss. Thereafter, responsibility for the investigation was delegated to DOT's Office of Inspector General (OIG) and FAA's Air Traffic Safety Oversight Service (AOV).

As described in the report of December 14, 2009, the OIG-AOV investigation partially substantiated the allegations. The whistleblowers commented on the report pursuant to 5 U.S.C. § 1213(e). A copy of the reports and the whistleblowers' comments is enclosed; a brief summary of the agency's findings and the whistleblowers' comments follows.

The investigation partially substantiated the allegation that aircraft arriving on Runway 27 that must execute a go-around or a missed approach, could come into conflict with traffic landing on Runway 18R. Given the frequency of go-arounds at Memphis Airport, the whistleblowers cited the use of Runway 27 for arrivals as a significant safety concern. The report acknowledges that aircraft arriving on Runway 27 and executing a go-around could come into conflict with aircraft arriving on Runway 18, but states that go-arounds have not occurred with significant frequency. This conclusion was based on a review of the number of arrivals at Memphis Airport from October 2008 to December 2008. That review found that of 44,081 arrivals there were 118 go-arounds, 46 of which involved Runways 18R and 27. In order to reduce the occurrence of these events, the report states that Memphis Airport's Standard Operating Procedures include "best practices" for this operation and training to instruct controllers on how to avoid such conflicts.

Furthermore, the report states that Memphis Airport has decided against applying for a waiver of FAA Order 7110.65's requirements for intersecting runways and flight paths. The facility is now in compliance with that order and uses the Converging Runway Display Aid (CRDA) to implement simultaneous dependent arrivals. CRDA ensures adequate separation between aircraft by projecting a "ghost" target onto ATC's displays, so that they may more accurately space aircraft on arrival.

The investigation determined that a lack of recent experience among ATCs with the volume of Federal Express aircraft using Runway 27 during the midnight shift may present safety concerns when that runway is again operational.² In response to this finding, FAA stated that training was planned and that an operational implementation plan for the reopening of the runway was in place. The schedules of Operations Managers and Frontline Managers had also been adjusted so there would be an increased management presence when operations on Runway 27 resume. Individuals recently certified, or with little experience have been identified so that they can receive additional training. FAA also noted that the airport and users of the facility have been advised that the use of Runway 27 would gradually increase over a period of several weeks until complete familiarization was achieved. The

²At the time the report was completed, Runway 27 was closed. The runway reopened in November 2009.

operation and management of Runway 27 will also be constantly evaluated as the runway returns to its full use and capacity.

The investigation substantiated the allegation that on at least two occasions, a supervisor stopped an air traffic controller from preventing a loss of separation and thereafter, failed to report the resulting operational errors. The supervisor, who is now retired, was required to undergo training, recertify on all operational positions, and to work under the direct supervision of the Operations Manager for one month. According to the report, Mr. Nesbitt identified 232 possible air traffic events between October 1 and December 16, 2008. The digital audio tapes and the radar audio playback terminal operations recordings were available for only 75 of those events. A review of the data available determined that 35 were most likely to present operational errors and confirmed 3 were operational errors. The report noted that the lack of documentation shows the procedural weaknesses in reporting and investigating operational errors. The OIG has recently reviewed FAA's process for reporting and investigating operational errors and included a copy of its Memorandum as Attachment 4 to the report.

The report confirmed that the Airport Movement Area Safety System (AMASS), the surface radar system presently in place for the detection of aircraft, ground vehicles, or other objects on the ground, is not certified for and does not cover Runway 27. Due to the antenna's weight, it could not be placed on the air traffic control tower, which would have allowed for maximum radar coverage. The antenna was, instead, located in the airfield covering only the three parallel runways. The report explains that use of the AMASS system, or any other surface movement detection system, is not required by FAA regulation. Nevertheless, Memphis Airport is planning to deploy an upgraded surface radar detection system in January 2011. This system, referred to as Airport Surface Detection Equipment Model (ASDE-X), will be installed on the new tower presently under construction at Memphis Airport and will cover all runways, including Runway 27.

The allegation that Memphis Airport ATCs allow aircraft, in particular FedEx aircraft, to exceed the maximum tail wind speed for arrival and departure was partially substantiated. The report states that no FAA Order prohibits this. Generally, management will not allow use of runways where the aircraft would experience a tailwind in excess of seven knots. However, FAA Order 7110.65 permits controllers to select a runway for departure or arrival which will result in the aircraft exceeding a maximum tailwind speed if it is "operationally advantageous" or requested by the pilot. The report confirms that the decision regarding which runway configuration to run includes input from FedEx on its operational needs as the airport's largest carrier. Additional factors considered are the weather and traffic volume. Thus, the report states, ATCs have allowed aircraft to exceed the seven knot tailwind when requested by the pilot and when doing so does not exceed the maximum tailwind speed established by the aircraft manufacturer.

The investigation substantiated the allegation that Memphis ATCs have failed to notify pilots when their aircraft leave Class B airspace³ in violation of FAA Order 7110.65. The report states that in May 2008, Air Traffic Organization, Safety Services (ATO-Safety) and FAA's Eastern Service Center Safety Assurance Group audited Memphis Class B airspace services. After assessing 14 hours of voice and radar from the time periods with the largest number of arrivals at the airport, the audit found that one-half of the pilots did not receive the required notice when their aircraft left the Class B airspace. As part of the facility's efforts to address this matter, ATCs have received training and briefings on Class B requirements. The investigation also revealed that required Class B airspace evaluations have not been documented, and that FAA does not require that they be documented. FAA Order JO 4200.2 requires an evaluation of existing and candidate Class B airspace biennially. Evaluations of Memphis Airport were conducted in 2007 and 2009, and reportedly no issues were identified which would warrant modifying the existing airspace. However, the investigation could not confirm this assertion because the evaluations were not documented.

With respect to the whistleblowers' concerns that the Taxi-into-Position-and-Hold (TIPH) rules contribute to dangerous go-arounds on Runway 27, the report acknowledges that the TIPH rules do not permit an aircraft on final approach to be cleared for landing if another aircraft is holding on Runway 27, thus, requiring the approaching aircraft to execute a go-around. However, the report states that FAA has reviewed Memphis' TIPH operations annually, as required, and no safety concerns were identified in the 2008 and 2009 reviews. Furthermore, ATO-Safety tracks and classifies all domestic TIPH incidents and has not identified any dangerous trend associated with Runway 27's operations. The investigation confirmed that the training program for Memphis ATCs includes refresher training on TIPH procedures.

In response to the investigative findings, OIG and AOV recommended that 1) FAA conduct a risk assessment study regarding simultaneous independent operations on runways 27 and 18R within 30 days of reopening the runway, and that AOV audit the airport's operations within 90 days of implementation; 2) FAA reemphasize to Memphis Airport air traffic control staff that a suspected loss of separation immediately be reported and training provided to the personnel responsible for failing to identify the operational error, and 3) FAA require biennial reviews of Class B airspace be documented so that the conclusions reached in those reviews can be analyzed and verified. The report notes that FAA Administrator Randolph Babbitt concurred with the investigative findings and recommendations. The investigation did not substantiate the remainder of the allegations.

The agency submitted a supplemental report to OSC on May 20, 2010, which provided additional information in response to OSC's follow-up inquiries. The agency provided a

³Class B airspace is highly-regulated airspace designed to enhance the management of air traffic operations. Its primary purpose is to reduce the potential for midair collisions in the airspace surrounding busy airports. Class B airspace is designed to segregate large turbine-powered aircraft from smaller, slower aircraft. The goal is to separate the high density instrument flight operations at busy terminal airports from nonparticipating Visual Flight Rules aircraft operating in the same area. Pilots must adjust the aircraft's operation when below the floor of the Class B airspace, for example, air speed must be decreased to allow for better visibility of air traffic.

second supplemental report⁴ on June 10, 2010. The second supplemental report described the audit conducted by AOV as a follow-up to the investigation. The purpose of the audit was to determine whether the Air Traffic Organization had enacted safety measures to prevent aircraft arriving on Runway 27 from conflicting with the flight path of aircraft arriving on Runway 18R when aircraft on Runway 27 execute a go-around or missed approach. As explained in the second supplemental report, AOV auditors concluded that while Memphis Airport had conducted training for employees on the Runway 27 operation, the facility had not developed procedures to mitigate a safety risk associated with go-arounds or missed approaches for air traffic operations involving Runways 27/18R.

On August 6, 2010, the DOT Office of General Counsel provided an update on the status of the risk assessment to be undertaken at Memphis Airport. FAA advised that a safety assessment of go-around events for the period of November 30, 2009, through February 15, 2010, was conducted. The safety assessment was described as an informal audit; a primarily quantitative evaluation. Upon review of the safety assessment, FAA's Office of Audit and Evaluation determined that a more detailed and comprehensive risk assessment study is warranted. FAA planned to begin the risk assessment study the week of August 10, 2010. The length of time necessary to complete the study depends on whether new risks are identified and whether the risks identified are too high. In the event that new risks are found, the report will be issued as a Safety Risk Management Document with an estimated completion time of "75+ days," and up to 6-8 months if statistical modeling is required. If the assessment does not identify any additional risks and those identified are characterized as low or medium, the report will be issued as a memorandum and is expected to be completed in "45+ days."

Mr. Nesbitt provided detailed comments on the agency report and supplemental reports. He believes that the agency's response is deficient and that there continue to be numerous unresolved safety concerns at Memphis Airport. Specifically, he writes that the report did not expose the systemic cover-up of operational errors, failed to address the misapplication of the CRDA, the potential conflict between traffic executing a go-around on Runway 27 and aircraft arriving on Runway 18L and 18C, the effect of wake turbulence on Runway 27 go-arounds, and placed the responsibility of tailwind operations completely on pilots. He emphasizes that the investigation was hampered by a loss of data and the change in OIG personnel investigating the case. Mr. Nesbitt maintained that had the digital voice and radar data been preserved, additional operational errors would have been substantiated. He reported that the original OIG investigator assigned to the case intended to conduct a follow-up interview with him, but that OIG personnel who took over the case declined to interview him again or conduct any additional follow-up. He believes that the change in personnel and investigative strategy had a significant impact on the investigation and colored the findings in favor of FAA.

In addition, Mr. Nesbitt commented that the investigative process takes too long and that there was no accountability for the unsafe practices that were allowed and condoned by

⁴The second supplemental report is dated May 14, 2010.

Memphis FAA management officials. He stated that unreported operational errors and deviations are routine at Memphis Airport, especially when CRDA procedures are in use. Memphis FAA management pressures controllers to run air traffic operations with minimum spacing. The small margin of error this creates does not enhance safety, but rather, sets up the possibility for increased numbers of go-arounds. This pressure combined with the controllers' fear of discipline or removal creates an environment which discourages ATCs and frontline managers from reporting operational errors or deviations. Mr. Nesbitt also doubts that the "best practices" included in the airport's SOPs will have any positive effect on aviation safety.

Mr. Nesbitt also commented on the Air Traffic Safety Action Plan (ATSAP) which has been implemented at Memphis Airport and other airports around the country. Noting that time will tell if ATSAP is effective, he expressed concern that the program may be a means by which FAA buries the incidence of operational errors, safety issues and concerns with the National Airspace System. He also stated that the Traffic Analysis and Review Program (TARP) can provide significant air traffic events but that FAA does not, however, have the manpower or resources to investigate the volume of operational errors which would be recorded nationwide if TARP operated continuously. As FAA rebuilds its workforce in response to the large numbers of controllers retiring, TARP will identify the operational errors resulting from controller inexperience or cover-up by FAA managers.

Mr. Nesbitt emphasizes that there are difficulties associated with being a whistleblower and that engaging in whistleblowing is likely to negatively affect one's career and professional relationships. FAA is primarily concerned with damage control and routinely ridicules those who choose to voice their concerns with or objections to unsafe practices. In this case, only one Memphis FAA Manager was disciplined. Other Memphis FAA management officials were allowed to work until retirement or promoted.

In conclusion, Mr. Nesbitt praises Memphis ATCs as some of the best with whom he has worked and notes the difficulty of working for management officials tasked with carrying out FAA's "unwritten policy of profit over safety." A new message focusing on safety must come from the President through the DOT to FAA. FAA whistleblowers must have a mechanism for disclosure of safety issues without fear of retaliation. He emphasizes that FAA whistleblowers are not the problem, but can be part of the solution.

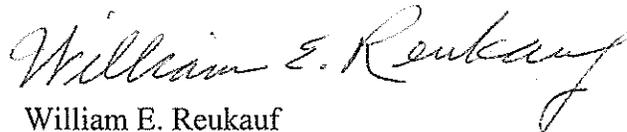
Mr. Weiss was critical of the agency report and provided detailed comments on the eight allegations identified in the report and on the supplemental report. He emphasized that the agency fails to address safety and management issues with the assistance of the whistleblower and "instead buries the problems or the people who report them for unexplained reasons . . ." He continued stating that the agency should be focused on correcting the problems identified and documented by the whistleblowers, not punishing the messengers. Mr. Weiss also found that the agency's response to managers found responsible for safety violations, including a manager who stopped "a controller from preventing a loss of separation," inadequate and unacceptable.

Furthermore, Mr. Weiss commented that after almost three years of agency review, significant runway safety problems still exist at Memphis International Airport. He maintained that there is a high risk of a mid-air collision occurring at the airport as a result of unsafe runway designs. He emphasized that a virtually identical problem existed at Newark Liberty International Airport prior to implementing new flight procedures, yet nothing has been done to address the same safety risk at Memphis International Airport. Mr. Weiss added that neither he, nor his family, will fly into Memphis Airport because of its unsafe runway operations.

Finally, OSC reviewed the original disclosures, the agency's reports, and the whistleblowers' comments. Based on that review, OSC determined that the reports contain all of the information required by statute and its findings appear to be reasonable. This determination is tempered, however, by the evident need for continued vigilance at Memphis Airport. As the second supplemental report notes, AOV's post-investigative review found a heightened awareness of safety concerns posed by air traffic operations involving Runway 27. This heightened awareness was, as yet, unaccompanied by action to mitigate risks to safety and reinforce the message that safety is paramount. OSC urges DOT to take the appropriate steps to ensure that FAA follows through with its intent to evaluate the risks associated with managing air traffic on Runway 27 and address the safety risks identified.

As required by law, 5 U.S.C. § 1213(e)(3), OSC has sent copies of the reports and the whistleblowers' comments to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science, and Transportation, and the House Committee on Transportation and Infrastructure. OSC has also filed copies of the agency's reports and the whistleblowers' comments in our public file, which is now available online at www.osc.gov, and closed the matter.

Respectfully,



William E. Reukauf
Associate Special Counsel

Enclosures