



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

June 26, 2013

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

Re: OSC File No. DI-12-1960

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), please find enclosed the agency report and supplemental report received from the Honorable Robert S. Rivkin, General Counsel, U.S. Department of Transportation (DOT), in response to disclosures made by Sean P. Dunleavy, an Air Traffic Control Specialist, at the Federal Aviation Administration (FAA), Westchester Air Traffic Control Tower (Westchester Control Tower), White Plains, New York. Mr. Dunleavy, who consented to the release of his name, alleged that certified professional controllers and developmental, or trainee, controllers in the Westchester Control Tower engaged in prohibited activities while on position, compromising air safety and resulting in a substantial and specific danger to public safety, violations of law, rule, or regulation, and gross mismanagement.

The agency investigation substantiated the following allegations:

- **Controllers used personal electronic devices, including cell phones, in the tower cab; however, the investigation concluded that the majority of the electronic device usage occurred while controllers were on break.**
- **A certified professional controller violated an FAA Order and local operating procedures when he failed to remain in the tower for two minutes after a position relief briefing.**
- **Unwanted items were left by co-workers in Mr. Dunleavy's cubby in the tower cab; however, the investigation was unable to determine that the items conveyed or posed a specific threat.**
- **Threatening language was posted on a website; however, the investigation was unable to determine whether the author was an employee at the Westchester Control Tower or any other FAA facility.**

The agency investigation did not substantiate the following allegations:

- **The investigation did not find that controllers slept in the tower cab on duty or on break.**
- **The investigation did not find that management deliberately failed to provide assistance or permitted staffing shortages during periods of heavy traffic volume.**
- **The investigation did not conclude that a front-line manager altered tower logs to show he was in the tower cab when a fatal accident occurred.¹**
- **The investigation did not find that supervisory controllers attempted to disparage Mr. Dunleavy in front of a trainee.**
- **The investigation did not find that controllers refused to work with Mr. Dunleavy because he provided videos and photographs of controllers in the tower cab to Fox News in February 2012.**

In response to these findings, the Air Traffic Organization (ATO) worked in conjunction with FAA's Office of Chief Counsel to propose and implement administrative action against management officials at the facility. ATO also developed a corrective action plan to bring the facility into compliance with FAA rules, procedures and standards. FAA's supplemental report confirms that 16 Letters of Reprimand and 4 Proposed Notices of Suspension were issued to Westchester Control Tower personnel. I have determined that the agency's findings appear reasonable.

Mr. Dunleavy's allegations were referred to the Honorable Ray LaHood, Secretary of Transportation on April 25, 2012. Secretary LaHood delegated authority to Mr. Rivkin to review and transmit the agency report to OSC. Mr. Rivkin transmitted the agency's report on August 27, 2012; the supplemental report was transmitted on September 14, 2012. Mr. Dunleavy provided comments on the report on December 14, 2012. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.²

¹This allegation was not included in OSC's referral but was reported by Mr. Dunleavy during the course of the agency's investigation. As a result, investigators reviewed the allegation and included the findings with the agency's report on Mr. Dunleavy's allegations.

²The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

The Allegations

Use of Personal Electronic Devices and Sleeping

Mr. Dunleavy alleged that during the past four and a half years he has worked at Westchester Control Tower he observed controllers bring personal electronics into the tower cab and use the devices while on position, and fall asleep while on position in violation of FAA Orders. Mr. Dunleavy stated that controllers were frequently distracted by Kindles, books, laptops, and smartphones, and watched television in the tower cab on a television purchased by the National Air Traffic Controllers Association (NATCA). Mr. Dunleavy disclosed that these activities increased dramatically after March 2011 when the tower elevator became inoperable and it was difficult for controllers to use the official break room eight stories below the tower cab. He alleged that controllers and management failed to recognize and properly address these safety concerns and violations of FAA Orders.

Mr. Dunleavy stated that the use of smartphones, for personal calls or texting, and other electronic devices in the tower is prohibited. He explained that an FAA Memorandum dated December 16, 2005, requires that cell phones be powered off in all operational areas at any facility where ground-to-ground or ground-to-air communication is conducted, including air traffic control towers, because they can interfere with headsets by degrading, obstructing, or interrupting radio frequency transmission.

Mr. Dunleavy alleged that controllers frequently took naps in the tower cab while on position in violation of FAA Order JO 7210.3X, para. 2-5-2(d) (February 9, 2012), which states that supervisors must not condone or permit individuals to sleep while on duty. Similarly, para. 2-6-6(c) states that personnel performing supervision watch duties must not condone or permit individuals to sleep *during any period duties are assigned* (emphasis added). Prior to February 9, 2012, para. 2-6-6(c) read, "Personnel performing watch supervision duties shall not condone or permit individuals to sleep while on duty." According to FAA, the change in the Order recognizes that employees should have relief periods from assigned duties during their shifts.

Mr. Dunleavy stated that he did not report these allegations to his supervisors because they observed the behavior on a daily basis yet took no action. In the fall of 2011, Mr. Dunleavy approached local news outlets with videos of controllers engaging in the above-described prohibited activities. Fox News aired a story on February 24, 2012. FAA responded that while personal devices and sleeping are prohibited in the tower cab, an agreement with NATCA provided for an informal break area to accommodate these activities because the facility's

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

elevator had been out of service for approximately one year. Mr. Dunleavy maintained that there was no agreement with the union, either formal or informal. He noted that following the news report, management took some action including removing the television from the tower cab.

Improper Denial of Controller Request for Additional Spacing Between Aircraft

Mr. Dunleavy asserted that the pervasive use of personal electronics and sleeping in the tower cab were symptoms of greater management deficiencies at the Westchester Control Tower. For example, on August 7, 2011, Mr. Dunleavy was training a developmental controller under conditions that included decreased visibility of approximately one-quarter mile. Concerned that more time was needed between arriving aircraft, Mr. Dunleavy asked Nicole Drace, the Controller-in-Charge/Watch Supervisor on duty, to increase the separation from four to six miles, providing an additional 20 to 30 seconds between aircraft. Mr. Dunleavy explained that in good weather, standard separation is four miles, and that in the weather conditions of that day, supervisors routinely approve increased separation when requested by a controller for safety reasons. Mr. Dunleavy reported that Ms. Drace refused to increase the separation and told him to "make it work." Mr. Dunleavy maintained that there was no operational reason to deny his request, and that her refusal posed a significant safety concern because it adversely affected his ability to ensure adequate separation between arriving aircraft.

Failure to Schedule Sufficient Staff on Mother's Day 2011

Mr. Dunleavy described another safety concern that occurred on Mother's Day, May 8, 2011. He reported that he was scheduled to work with one other full-performance controller and a controller cleared only for ground control. According to Mr. Dunleavy, management was aware that the tower would be short-staffed and that, because it was Mother's Day, air traffic would be extremely busy, yet failed to assign any controllers for overtime. He noted that generally, seven or eight controllers would be scheduled for a day expected to be very busy, and that controllers work two hours on position followed by a half-hour break. Mr. Dunleavy reported that he was forced to remain on position for seven and a half hours without a break because of the staffing shortage. He alleged that remaining in position for seven and a half hours during a heavy traffic day posed a serious safety threat to the flying public.

Failure to Schedule Sufficient Staff on July 5, 2011

Mr. Dunleavy disclosed that on July 5, 2011, Westchester Control Tower was again short-staffed on a heavy air traffic day. He reported that four full-performance controllers should have been scheduled but only two were, with one additional controller cleared for ground control. Because of the heavy volume of traffic, Mr. Dunleavy became very concerned that the facility was becoming overloaded, and requested that Front-Line Manager Robert DeGennaro come to the tower to assist. When Mr. DeGennaro failed to arrive, Mr. Dunleavy reported that he and a co-worker requested assistance several more times over the course of the morning, including a

request to the manager on duty, Acting Air Traffic Manager (AATM) Dwight Lemelle. While Mr. Lemelle and Mr. DeGennaro indicated that they would respond, neither came. Mr. Dunleavy alleged that given the volume of air traffic and repeated requests for assistance, it was clear there was a safety concern. He contended that the failure of Mr. DeGennaro and Mr. LeMelle to respond to those concerns constituted a danger to air traffic safety.

Failure to Follow Procedure for Relief Briefing

Mr. Dunleavy described another incident that affected safety on March 19, 2012, following his disclosure to the local news media. Mr. Dunleavy arrived in the tower to relieve Certified Professional Controller Wycliff Walcott. Mr. Walcott provided Mr. Dunleavy with a position relief briefing, but when Mr. Dunleavy requested clarification, Mr. Walcott ignored his inquiries and abruptly unplugged his headset and left the tower. Mr. Dunleavy alleged that this conduct violated FAA Orders and local operating procedures, explaining that the controller being relieved must remain plugged in for two minutes in order to ensure the relieving controller fully understands the operational situation. FAA Order JO7210.3X, para. 2-2-4(e) states that the controller being relieved is responsible for ensuring that any pertinent status information be relayed to the relieving controller. Similarly, FAA Order JO 7210.56C, App. 4, *Instructions for FAA Form 7210, Final Operational Error/Deviation Report*, states that relief briefing errors, including the failure to provide or request a relief briefing, or providing an incomplete or erroneous briefing, are special errors of both communication and coordination.

Threats to the Whistleblower

Mr. Dunleavy stated that shortly after his disclosure to the news media in February 2012, he received threats from individuals who worked in the tower. He cited the incident with Mr. Walcott as an example of how the degradation of his professional relationships adversely affected aviation safety.

The Department of Transportation Report

FAA's Office of Audit and Evaluation investigated the allegations with assistance from the Air Traffic Organization and the Office of Safety and Technical Training. The investigation reviewed previous investigative evidence and reports from FAA Security and Hazardous Materials Safety and included 56 interviews in addition to the review of historical weather records, training records, and shift and time and attendance records from the CRU-ART and CRU-X systems.³ Investigators also reviewed video and audio recordings, photos, and information related to air traffic operations and daily tower instrument operations.

³CRU-X is a time and attendance and labor distribution reporting system CRU-ART, a component of the CRU-X system, provides specific information on the identity, position, and time worked for controllers on each position at a facility.

Use of Personal Electronic Devices and Sleeping

The investigation found that employees violated agency policy and procedure by using personal electronic devices and watching television in the tower cab. The investigation did not, however, substantiate the allegation that controllers were sleeping while on position.

The report explains that the facility used the tower cab as a break room from March 2011 to April 2012 because the elevator was out of service. The elevator remained inoperable for this length of time for a number of reasons: the elevator shaft flooded multiple times from March to May 2011, asbestos was discovered and had to be removed, and due to the age of the facility the contractor had to obtain custom parts for the elevator. The repairs to the elevator were completed by April 2012.

AATM Lemelle and the NATCA representative told investigators that following the elevator outage, they informally agreed that the tower cab could serve as the break room. The report notes that no e-mails or other documentary evidence setting forth this agreement was found during the course of the investigation. The report points out, however, that the prohibition relates to the use of electronic devices or engaging in conduct distracting to air traffic operations, not to the location of a break room.

Use of Personal Electronic Devices. The investigation concluded that prior to Mr. Dunleavy's disclosure to Fox News on February 23, 2012, there was widespread non-compliance with the FAA's prohibition on the use of personal electronic devices among controllers. On February 25, 2012, following the Fox News story, AATM Lemelle issued a memorandum reinforcing workplace standards. This memorandum included the prohibition on cell phone use on the operational floor and the requirement that all electronic devices, including cell phones, must be in the "off" position.

The report states that 17 of the 18 controllers admitted using cell phones to text, watch movies or read personal material while on break in the tower cab. Two controllers admitted texting and using their cell phones while on position. All controllers confirmed that there was a television in the tower cab, seven admitted watching television on break, and two stated that the television was on during the Super Bowl game on February 5, 2012, although they denied watching television while on position. Investigators concluded that the evidence suggests the television was facing the break area, not the operations area. Front-Line Manager Chris Mazza reported that when he discovered the television on during the Super Bowl, he had it removed from the tower cab. The three other front-line managers acknowledged that they had seen the television, but denied knowing that it was kept in the tower cab.

After the news story aired in February 2012, FAA requested unedited copies of the video tapes. In June 2012, Mr. Dunleavy provided investigators with copies of 35 video recordings and 5 photographs he obtained from Fox News. The report notes that some of the videos received were not original and had been edited. The analysis of the video recordings shows that

some controllers were using cell phones while on position and on break. One controller admitted texting while on position, but others maintained they were texting while on break. In some instances, investigators were unable to ascertain the date and time from the video and so could not review the recordings against the tower's time and attendance logs. As a result, they were unable to determine whether the videotaped activity took place on position or on break.

The investigation found no evidence that FAA personnel at Westchester Control Tower were unaware of FAA's prohibition on the use of personal electronic devices in the tower cab. On June 6, 2011, Front-Line Manager Chris Mazza issued a Read and Initial Memorandum on cell phone and internet use and attention to position. He emphasized that distractions in the tower cab should be eliminated and reminded controllers that non-work internet use while on position and cell phone use are prohibited. Controllers were asked to read and initial the memorandum acknowledging they understood the policy and instruction. Nevertheless, the report describes a "don't ask, don't tell" policy on electronic devices where supervisors did not tell controllers they could not use the devices on break and controllers did not ask. Controllers reported that because supervisors did not correct the behavior of controllers on break, they assumed the activity was allowed. Indeed, the report notes that while there were some on-the-spot corrections for use of electronics, there is little evidence that the prohibitions set forth in the Read and Initial Memorandum were enforced until the media coverage in February 2012.

Sleeping on Position. Mr. Dunleavy and Certified Professional Controller Thalha Choudhury told investigators that they observed controllers sleeping in the tower on position but could not provide specific dates and times. They explained that they did not report their observations to FAA management because management officials were already aware that controllers were sleeping but took no corrective action. Mr. Dunleavy offered video tapes and photographs as support for the allegation.

Investigators used a software enhancement tool to identify the devices used to make the recordings and to identify the dates they were made. Of the 35 videos and 5 photographs analyzed, investigators were able to identify the date of 31 of the videos and 3 of the photographs. Based on the analysis of the five tapes that purport to show controllers sleeping, the investigation concluded that the videos did not substantiate the allegation that controllers were sleeping on duty. The report notes that investigators did find some of the controllers exhibiting physical symptoms of fatigue, such as heavy eyelids, drooping head, and slow reaction time. However, the evidence did not support the conclusion that they were in a "sleep-like" state. As support for this conclusion, the report notes that one controller is seen talking with his eyes closed, and another is reading, blinking and moving. Three other controllers are all seen moving and the report notes that one was on break and another was in a non-operational status. In addition, in sworn interview statements made during this investigation, the controllers stated that they were caught in a blink, had their eyes closed while on break, or were listening to air traffic with their head down to concentrate. Finally, the report notes that filming controllers in the tower cab is itself a violation of FAA's policy on the use of electronics on the operational

floor. Thus, the investigation concluded that Mr. Dunleavy had violated the policy on several occasions.

Failure to Schedule Sufficient Staff on Mother's Day 2011

The investigation did not substantiate the allegation that Mr. Dunleavy was required to work seven and a half hours without a break because management failed to schedule sufficient staff or overtime on Mother's Day, May 8, 2011, a day known to generate a heavy volume of air traffic. Mr. Dunleavy reported to investigators that Nicole Drace, the controller-in-charge the day before, intentionally failed to schedule an additional controller for overtime when an employee called in sick and she became aware that the facility would be short-staffed the next day. He stated that in addition to himself, there were only two other people working in the tower that morning: a full-performance controller and a developmental controller. Mr. Dunleavy reported that no other employee reported for work until 1:00 pm.

The investigation found that after Ms. Drace was notified that an employee would be out sick, she called employees on the overtime list and left messages authorizing overtime for the next day. Mr. Choudhury stated that he received the message and planned to come in at 10:00 a.m. instead of at 12:00 p.m. as scheduled. However, he did not advise Ms. Drace or anyone else at Westchester Tower Control of his intention to come in early.

When Mr. Dunleavy arrived for his shift, as the controller-in-charge at 5:45 a.m., he called Mr. Choudhury and requested that he come in earlier because the facility was short staffed. Mr. Choudhury agreed and arrived at 6:35 a.m. The report states that the tower was fully staffed for the morning with three certified professional controllers and one developmental controller. The report also explains that if Mr. Dunleavy had not been able to reach Mr. Choudhury, he could have contacted a front-line manager or notified the AATM that additional assistance was needed in the tower. In addition, the report explains that as the controller-in-charge, Mr. Dunleavy could have scheduled a break for himself. The report notes the times when other personnel took breaks during this shift and states that he could have shortened or rescheduled the breaks to allow the schedule to accommodate a break for himself. Thus, the investigation found that his failure to take a break was not due to insufficient staffing.

The records for May 8th show a significant increase in the volume of air traffic for Mother's Day 2011. In 2011, there were 655 arrivals and departures compared to 384 in 2010 and 382 in 2009. Based on this review of traffic records, the investigation concluded that there was no prior indication that Mother's Day 2011 would be particularly busy and additional staff would be required.

Failure to Schedule Sufficient Staff for July 5, 2011

The investigation did not substantiate the allegations that insufficient staff was scheduled on July 5, 2011, typically a heavy air traffic day, and that two front-line managers and the

AATM Lemelle failed to respond to repeated requests for assistance. Mr. Dunleavy reported to investigators that on the morning of July 5, 2011, he was on duty with certified professional controller Thomas Kanzler and Mr. Lyons, a developmental controller. He stated that due to the heavy volume of air traffic, Mr. Kanzler called Front-Line Manager DeGennaro and requested that he come upstairs to assist. Mr. DeGennaro reportedly replied that he would. Mr. Dunleavy stated that approximately 45 minutes later either Mr. Lyons or Mr. Kanzler called "begging" Mr. DeGennaro to assist and another call was made to AATM Lemelle for assistance. Mr. Dunleavy reported that when Mr. DeGennaro finally came to the tower at noon the traffic rush was over.

A review of the facility records for the day showed that from 7:00-10:30 a.m., the tower was staffed with three certified professional controllers and two developmental controllers in addition to Mr. DeGennaro; not the two certified professional controllers and one developmental controller as alleged. In addition, at 10:30 a.m. Front-Line Manager Nancy Reilly and Certified Professional Controller Choudhury arrived. The traffic count of 1,012 operations for the day suggests that the facility was busy. AATM Lemelle maintained that the 134 operations noted from 8:00-9:00 a.m. was misleading, however, explaining that the number included operations that do not require air traffic assistance such as the "touch and go" operations conducted by a local helicopter school at the airport.

Mr. Kanzler, the Watch Supervisor from 6:30-9:06 a.m., did not recall that the traffic that day was particularly busy or that the volume of traffic presented safety concerns. He did not recall asking Mr. DeGennaro to provide assistance nor does he recall being asked to do so. Further, he stated that if the traffic was too heavy, training operations would have ceased until the traffic returned to a normal level, yet the records indicated that training continued. The CRU-ART records show that Mr. Dunleavy was conducting training with developmental controller George Thomas from 6:37-7:09 a.m. Thereafter, training continued until 8:39 a.m. Two other certified professional controllers recall being busy but did not recall any problems. Mr. Lyons reported that the facility was abnormally busy with outbound traffic but that it was not complex. He stated that he paged Mr. DeGennaro around 9:00 a.m. when the traffic was getting busy. Approximately 20 minutes later he recalled that someone called AATM Lemelle looking for Mr. DeGennaro. However, Mr. Lyons stated that at no time did the volume of traffic pose a safety hazard nor was the tower short staffed.

The investigation found that during the morning of July 5, 2011, Mr. DeGennaro worked on administrative duties from 7:51-11:44 a.m. During that time he participated in a conference call concerning the National Transportation Safety Board (NTSB) requirements for an accident packet that had to be prepared on a fatal accident that occurred at Westchester Airport on June 18, 2011. He reported that he checked in with the tower periodically and spoke to Certified Professional Controller Heuer who informed Mr. DeGennaro the tower was busy, but no additional assistance was needed. He stated that he did not hear a page from the tower; the report notes that the paging system is an overhead speaker and Mr. DeGennaro may not have heard it while he was on the conference call. Finally, AATM Lemelle did not recall receiving a

telephone call asking for Mr. DeGennaro nor did he recall any complaints or problems regarding the July 5 operations. He added that the Watch Supervisor has the authority to recall controllers from break at any time to meet the needs of the facility, if necessary.

Improper Denial of Controller Request for Additional Spacing Between Aircraft

The investigation did not substantiate the allegation that Controller-in-Charge Nicole Drace created a danger to public safety and engaged in an abuse of power on August 7, 2011,⁴ when she denied Mr. Dunleavy's request to increase the spacing between aircraft from four to six miles to allow an additional 20 to 30 seconds between aircraft.

Investigators interviewed the individuals involved in this incident as well as the AATM Lemelle and the Front-Line Manager on duty. Mr. Dunleavy reported that visibility fluctuated throughout the morning and explained that around 1:15 p.m. he asked Ms. Drace to call approach control and request an increase in spacing to six miles because visibility had decreased to one-quarter mile. Ms. Drace reportedly denied the request and told him to "make it work." Mr. Dunleavy reported that Developmental Controller Lyons also thought they needed the additional spacing and was "scared" to run departures with arrival aircraft spaced at four miles. Mr. Dunleavy stated in good weather standard separation is four miles and that requests for increased separation are routinely approved in bad weather.

During his interview, Mr. Lyons reported that he asked for the additional spacing, not Mr. Dunleavy. He acknowledged that he was nervous and wanted the extra spacing for departures between aircraft. He reported that Ms. Drace responded positively that he could make the four miles work. Moreover, Mr. Lyons insisted that the operation was not unsafe and he alone was controlling the air traffic, while Mr. Dunleavy was observing. Investigators questioned Mr. Lyons about his prior statements on this incident in his February 2012 affidavit related to a different complaint filed by Mr. Dunleavy in 2011. In the 2012 affidavit, Mr. Lyons stated that he had the "sense" that Ms. Drace was attempting to create errors that would be attributable to him and Mr. Dunleavy and that she was creating an unsafe situation. When asked about those statements during this investigation, Mr. Lyons responded that in the past few months he had gained more experience as a controller and, as a result, his perceptions of the events and the need for spacing had changed.

Ms. Drace reported to investigators that Mr. Lyons, not Mr. Dunleavy, asked for the additional spacing. She stated that she asked him one question and told him that he could run the operations with the four-mile spacing. Investigators reviewed the meteorological data for July 29, 2011, and August 7, 2011, and found that on the afternoon of July 29, 2011, when Mr. Dunleavy and Mr. Lyons reported for work at approximately 1:30 p.m., and while Ms. Drace was the Controller-in-Charge, the ceiling was never below 800 feet or 2 miles visibility. Finally,

⁴The facility time and attendance records showed that Mr. Dunleavy, Mr. Lyons and Ms. Drace were not working together on August 7, 2011. Investigators determined that this incident took place on July 29, 2011.

AATM Lemelle did not recall the incident specifically but stated that a six-mile separation is “unheard of” at Westchester because the airport does not have the traffic to warrant a separation of this length. The minimum separation is three miles, and because operations were running with a four mile separation he felt confident that operations were safe.

The investigation concluded based on the evidence reviewed, that Ms. Drace did not compromise safety by refusing to ask for additional spacing. This incident was a difference of opinion between Mr. Dunleavy, who believed the spacing was too tight to allow departures in between the arrival gaps, and Ms. Drace who believed the spacing was sufficient.

Failure to Follow Procedure for Relief Briefing

The investigation substantiated the allegation that Certified Professional Controller Wycliffe Walcott violated FAA Order and local operating procedures when he failed to answer Mr. Dunleavy’s requests for clarification on the air traffic and did not remain plugged in for two minutes after the relief briefing. The report explains that in a position relief briefing the relieving controller familiarizes himself or herself with the operating situation prior to advising the controller being relieved that he or she is ready to assume responsibility for the operation. The controller being relieved then initiates the briefing by activating the Rapid Deployment Voice Switch, which records the briefing. Investigators interviewed all certified professional controllers signed on to positions at the time of the relief briefing as well as Mr. Dunleavy, Front-Line Manager DeGennaro, Developmental Controller Lyons and Acting Air Traffic Manager Lemelle. They also listened to the voice recording, and reviewed all notes about the matter at the facility.

Mr. Walcott admitted that he did not remain plugged in for the required two minutes after completion of the relief briefing. He reported that he unplugged his headset and left the tower because Mr. Dunleavy announced he “had the flow,” i.e., he understood the traffic situation. Mr. Walcott believed Mr. Dunleavy was escalating the situation in an unprofessional manner through his repeated questions. Mr. Walcott reported that he received an “on the spot correction” from Front-Line Manager DeGennaro and AATM Lemelle. They counseled him, emphasizing that he had an obligation to stay and assist if Mr. Dunleavy, or any other controller, requests assistance, despite any prior statement from the relieving controller that he or she understands the traffic situation.

Threats to the Whistleblower

The investigation did not identify any specific threat to Mr. Dunleavy and, therefore, did not substantiate the allegation that controllers threatened him after he had provided local news media with videos of controllers allegedly engaged in improper conduct. However, the investigation did substantiate incidents of harassment.

Mr. Dunleavy reported that he feared for his physical safety because of postings on the internet website www.stuckmic.com and objects left in his headset cubby and locker. He reported his concerns to FAA Security and Hazardous Materials Safety in March 2012 and again in May 2012 after he learned that union officials stated at a meeting that they wanted to find out who gave the video to Fox News and “get him.” Additionally, Mr. Dunleavy reported that some employees refused to work with him and he feared they might try to set him up for an operational error or other safety event which would result in an action against him.

According to the report, the investigation found evidence that www.stuckmic.com contained comments about pushing the source of the Fox News story down the stairs and having a “blanket party.” Investigators did not, however, find any evidence that personnel at Westchester Control Tower posted the comments. Investigators also reviewed the objects left in Mr. Dunleavy’s cubby. In March 2012, ten pennies, a book about a fictional assassination entitled, “Final Target,” a four-cup cardboard cup holder and an empty seltzer bottle were left in his cubby. Mr. Dunleavy believed the pennies were meant to convey that his life was not worth “ten cents” and the book conveyed a threat. In May 2012, a 2012 Fenway Park magnet was on his locker. He interpreted this to be a message he should “get out of town,” and a yellow substance, believed to be highlighter, was found on the lock to his locker.

The report states that while Mr. Dunleavy believes leaving these items in his cubby constitutes harassment, investigators did not conclude that they conveyed a direct and specific threat. The report explains that investigators determined that the items were already in the tower and moved by an individual or individuals, but were unable to identify who placed them in Mr. Dunleavy’s cubby. Controllers denied knowledge of the incidents and stated that cubbies and lockers are neither assigned nor labeled so they did not know which one Mr. Dunleavy used.

Investigators confirmed that AATM Lemelle investigated the incidents of harassment reported by Mr. Dunleavy. Mr. Lemelle was similarly unable to determine who the responsible individual or individuals were but now requires that a front-line manager be present when Mr. Dunleavy is on duty. The investigation did not substantiate Mr. Dunleavy’s allegation that management did not investigate the potential threats.

Finally, Mr. Dunleavy did not provide specific examples or evidence of attempts by his coworkers to set him up for an operational error or safety event. Nevertheless, he remained concerned that co-workers would retaliate against him for the Fox News story. All personnel interviewed maintained that they would not jeopardize safety to retaliate against Mr. Dunleavy.

Falsification of Facility Logs

The investigation did not substantiate the allegation that Front-Line Manager DeGennaro was absent from the tower for one and a half hours prior to a fatal airplane accident on June 18, 2011, and thereafter tried to alter the tower logs to indicate that he had been on a short break and

cover up his lengthy absence. Investigators interviewed the employees present during the incident.

Mr. Dunleavy explained during his interview that he was not in the tower when the accident occurred. He reported that when he arrived later in the day Mr. Kanzler told him that Mr. DeGennaro was downstairs at the time of the accident but tried to alter the tower logs immediately thereafter. Mr. Lyons also informed investigators that Mr. Kanzler told him that Mr. DeGennaro was not in the tower and later tried to alter the logs. Mr. Kanzler, who was not on position but was in the tower at the time of the accident, denied ever making such statements. He stated that Mr. DeGennaro had been in the tower but went downstairs to provide ground school training to Ms. Aleriber Aviles. Mr. Kanzler further stated that he called Mr. DeGennaro when the accident occurred and he immediately returned to the tower. Moreover, he maintained that there were many witnesses in the tower who could confirm that Mr. DeGennaro was not in the tower at the time of the accident and that his presence would not have changed the outcome. Ms. Aviles and all other witnesses confirmed that she and Mr. DeGennaro left the tower shortly before the accident for training downstairs.

Mr. Choudhury advised investigators that if Mr. DeGennaro had been in the tower the accident might not have happened. However, he could not identify what steps Mr. DeGennaro could have taken that were not taken by Brandon Pinkston, the Controller-in-Charge. Further, a preliminary report from the NTSB found no evidence that controllers at the Westchester Control Tower or the New York Terminal Radar Approach Control failed in the performance of their duties, or that Front-Line Manager DeGennaro's presence in the tower would have changed the outcome of the accident. The cause of the accident appears to be mechanical.

A review of the facility CRU-ART systems showed that the system was accessed at 1:41 pm but no changes were made and the Record of Facility Operations Form did not contain any modifications to the log. Thus, based on the interviews and the review of the records, the investigation found that there was no evidence to conclude that Mr. DeGennaro altered facility records to indicate that he was in the tower when the accident occurred.

As noted previously, on September 14, 2012, FAA provided supplemental information on the status of the corrective and disciplinary actions. FAA reported that it was issuing 16 Letters of Reprimand to controllers who violated FAA policy by using personal electronic devices in the tower. In addition, FAA issued four proposed Notices of Suspension ranging from one to three days for three supervisors and one manager who allowed the use of personal electronic devices.

The Whistleblower's Comments

Mr. Dunleavy believes FAA never intended to investigate the safety concerns raised in his disclosure. Instead, he believes the investigation was designed to cover up the safety disclosures by attacking his credibility. Mr. Dunleavy stated further that the report presents pretextual explanations for finding that the videotapes he provided were not credible evidence of controllers

sleeping or otherwise engaged in misconduct. He also noted that the report accepts ridiculous explanations offered by controllers for the actions recorded on the tapes.

Mr. Dunleavy also provided specific comments on the agency investigation into each allegation; those comments are attached in their entirety.

In June 2013, Mr. Dunleavy provided additional comments noting that despite the evidence he provided, FAA continues to assert in its Annual Report to Congress that there is no discernible evidence controllers were sleeping on position or break, and that the majority of electronic device use occurred on break. Thus, Mr. Dunleavy contends FAA is intentionally misleading and lying to Congress. Finally, Mr. Dunleavy does not believe the disciplinary action taken is commensurate with FAA's Table of Offenses and Penalties.

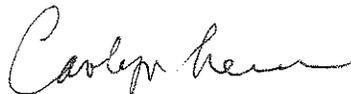
The Special Counsel's Findings

I have reviewed the original disclosure, the agency reports, and the whistleblower's comments. Based on that review, I have determined that the report contains all of the information required by statute and the findings appear to be reasonable.

Through his disclosures Mr. Dunleavy revealed widespread violations of FAA Orders governing conduct in the tower cab by virtually all air traffic control staff at Westchester Airport. As a result of his actions, the facility is now operating in compliance with those orders and safety has been enhanced.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report and the whistleblower's comments to the Chairman and Ranking Member of the Senate Committee on Commerce, Science and Transportation, and to the Chairman and Ranking Member of the House Committee on Transportation and Infrastructure. I have also filed a copy of the documents in OSC's public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures