



THE SECRETARY OF TRANSPORTATION
WASHINGTON, DC 20590

August 10, 2014

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

Re: OSC File No. DI-14-2176

Dear Ms. Lerner:

By letter dated May 19, 2014, you referred for investigation disclosures from an anonymous whistleblower who alleged: (1) in March 2014, Federal Aviation Administration (FAA) management in the Unmanned Aircraft Systems Integration Office allowed the Air Traffic Organization (ATO) to violate FAA orders by instituting an approval process for U.S. Department of Defense (DOD), Unmanned Aircraft Systems (UAS) operations which did not include a complete safety review procedure; and (2) since the process was implemented, nine DOD UAS operations have been approved without a proper flight safety review.

I delegated investigation of these allegations to FAA's Office of Audit and Evaluation. Enclosed is FAA's Report of Investigation. Neither allegation was substantiated. Because FAA has never had the authority to certify or exercise regulatory oversight of U.S. military aircraft, it has no authority to conduct airworthiness reviews of either manned or unmanned military aircraft. A lack of coordination between various DOD organizations appears to have contributed to the misunderstanding of FAA policy.

In July 2013, the FAA, the Office of the Secretary of Defense (OSD) and the UAS Executive Committee implemented FAA Order 8900.227, providing a broad range of requirements for all UAS operators including the requirement for FAA inspectors to verify pilot training, certification and airworthiness standards. The Order should have included exceptions for DOD in accordance with applicable authorities. Regrettably, the Order did not make this distinction. When the Order was sent into coordination for acceptance by DOD, OSD failed to coordinate with the military liaisons assigned to FAA, who are responsible for preparing and coordinating DOD waiver requests, and accepted the Order as written. The Order is being corrected to indicate appropriate DOD exceptions.

Notwithstanding FAA's lack of authority to perform regulatory oversight of DOD aircraft per se, DOD is required to comply with air traffic control rules and procedures when operating any aircraft in civilian-controlled airspace. Since all UAS are unmanned, if operating in the National Airspace System (NAS), they cannot comply with 14 CFR 91.113, section B, which requires

**Federal Aviation Administration
Report of Investigation
To the Secretary of Transportation**

In response to:

U.S. Office of Special Counsel (OSC)

File DI-14-2176

**Director, Office of Audit and Evaluation (AAE-1)
Federal Aviation Administration
Washington, D.C.**

June 5, 2014

Summary and Details

Secretary of Transportation Anthony Foxx directed the Federal Aviation Administration (FAA), Office of Audit and Evaluation (AAE), to investigate a U.S. Office of Special Counsel (OSC) whistleblower disclosure (OSC File No. DI-14-2176) referred to him on May 19, 2014. AAE is an independent FAA organization with authority to conduct oversight and investigation of aviation safety-related whistleblower disclosures. This disclosure was submitted by an anonymous whistleblower presumed to be employed by the FAA in Washington, DC.

The whistleblower alleged that (1) In March 2014, FAA management in the Unmanned Aircraft Systems Integration Office (UASIO) allowed the Air Traffic Organization (ATO) to violate FAA orders by instituting an approval process for Department of Defense (DOD), Unmanned Aircraft Systems (UAS) operations which did not include a complete safety review procedure; and (2) Since the process was implemented, nine DOD UAS operations have been approved without a proper flight safety review.

We did not substantiate either allegation. Since the Federal Aviation Act of 1958 created the Agency, the FAA has never had the authority to certify or exercise regulatory oversight of U.S. military aircraft. DOD alone possesses the statutory authority to certify, regulate, support, equip, maintain, and train all aircraft in the DOD inventory.¹ Thus, FAA has no authority to conduct airworthiness reviews of either manned or unmanned military aircraft.

FAA does have authority, however, to ensure that all aircraft operating in civilian controlled airspace (including military aircraft) conform with the requirements of 14 CFR 91.113 which require that an aircraft see and avoid other aircraft operating in the National Airspace System (NAS). As a UAS is unmanned, in order to comply with 14 CFR 91.113, either ground-based observers or an observer in a chase aircraft are typically used so as to see and avoid other aircraft that may conflict with the UAS. The primary duties of the ground-based observer are to report observed segment status, weather, and traffic updates and acknowledge when transit is complete. This method requires a Certification of Waiver or Authorization (COA) from the Air Traffic Organization (ATO) in accordance with FAA Order 7210.3X, Part 6, Chapter 18, *Waivers and Authorizations*.

The requestor, in this case DOD, submits FAA Form 7711-2 requesting a COA. The ATO personnel within UASIO conduct a comprehensive operational review, to include details on how the UAS intends to operate within the NAS, and comply with 14 CFR 91.113. In considering a waiver request, the ATO assesses what the vehicle will do in the airspace, the flight plan, and what contingency procedures are in place, for example for lost command/control link, lost communications, and other emergencies. This assessment process remains the same for any vehicle seeking to operate in the NAS. The type of vehicle is irrelevant. Balloons, rockets, UAS, etc. are all reviewed under the same provisions as an ATO function, specifically reviewed by the Airspace Regulations, Airspace Policy and Air Traffic Control Procedures Group (AJV). Prior to March 2014, this waiver review also included an airworthiness technical review by

¹ See 10 USC §113 Authority of the Secretary of Defense; 10 USC §8013 (U.S. Air Force); 10 USC § 3013 (U.S. Army); 10 USC §5013 (U.S. Navy); 10 USC § 5042 (U.S. Marine Corps). See also DOD Airworthiness Policy, DoDD 5030.61, Enclosure 3, Section 1b(1,2), May 30, 2013; and Joint Unmanned Aircraft Systems Minimum Training Standards, issued by the Chairman of the Joint Chiefs of Staff, CJCSI 3255.01 Ch 1, dated October 31, 2011.

FAA Aviation Safety Inspectors (ASIs), despite lacking statutory authority to do so. However, these inspectors believed they held such authority based upon the requirements contained in FAA Order 8900.227.

In July 2013, the FAA, the DOD Office of the Secretary of Defense (OSD), and the UAS Executive Committee implemented FAA Order 8900.227, providing a broad range of requirements for all UAS operators including the requirement for FAA inspectors to verify pilot training, certification, and airworthiness standards. The Order should have included exceptions for DOD in accordance with the applicable authorities identified in footnote 1. Unfortunately, it did not make this distinction. When the Order was sent into coordination for acceptance by the DOD, OSD failed to coordinate with the military liaisons assigned to FAA, who are responsible for preparing and coordinating DOD waiver requests, and accepted the Order as written.

In March 2014, after repeated complaints from the military liaisons assigned to FAA regarding FAA's lack of statutory authority to regulate military aircraft, the FAA recognized that this aspect of Order 8900.227 was unenforceable, inconsistent with the applicable statutes, and immediately terminated regulatory reviews of DOD UAS platforms. FAA Order 8900.227 is in the process of being corrected to indicate that the airworthiness, certification, training and maintenance requirements contained in Order 8900.227 are not applicable to DOD UAS.

Because the FAA does not have the authority to certify or regulate DOD UAS vehicles, we did not find that the nine COAs issued since the policy change in March 2014, are in violation of any law, rule or regulation, or represent a risk to public safety. ATO conducted appropriate operational reviews prior to granting the COAs and FAA continues to maintain authority over how military UAS and all other aircraft operate in civilian airspace.

Finally, the referral indicates that during the 2013 government shutdown, the ATO issued two COAs without conducting proper reviews. The whistleblower alleges that a full retroactive flight safety review was conducted after employees returned to work and complained. We learned, however, that James Williams, the UASIO Executive conducted reviews on behalf of Flight Standards Service (AFS) during the shutdown, and followed up with a retroactive review after employees returned to work due to confusion arising from the shutdown and ongoing discussions regarding FAA's regulatory authority over the airworthiness requirements of DOD UAS.

Based upon the absence of findings, there are no recommendations for corrective action.

Methodology

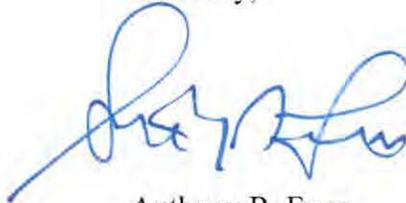
An investigator with AAE spoke to three FAA employees currently or formerly affiliated with UASIO. We consulted with Senior Executives from the ATO as well as Aviation Safety (AVS). Additionally, we spoke to two DOD officials. We also reviewed DOD Directives, a Safety Risk Management Document, previously issued COAs, FAA Orders, Federal Aviation Regulations, emails, and DOD's UAS Integration Plan. Our report was provided to ATO, AVS and FAA's Office of Chief Counsel for comments and concurrence.

vigilance by each person operating an aircraft so as to see and avoid other aircraft. As such, this requires DOD to request a Certification of Waiver or Authorization from ATO.

ATO assesses what the vehicle will do in the airspace, the flight plan, and what contingency procedures are in place, for example for lost command/control link, lost communications, and other emergencies. This assessment process remains the same for any vehicle seeking to operate in the NAS. Balloons, rockets, UAS, etc., are all reviewed under the same provisions by ATO and FAA continues to maintain authority over how military and all other aircraft operate in civilian airspace.

I appreciate the opportunity to review this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Anthony R. Foxx', with a long horizontal stroke extending to the left.

Anthony R. Foxx

Enclosure