



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

November 27, 2012

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

Re: OSC File Nos. DI-11-0747 and DI-08-2954

Dear Mr. President:

On May 8, 2012, pursuant to 5 U.S.C. § 1213(e)(3), I sent to you seven reports prepared by the Department of Transportation (DOT) based on whistleblower disclosures regarding various safety lapses at major airports and Federal Aviation Administration (FAA) facilities. I consolidated those reports because of their close proximity in time and to highlight FAA's pattern of insufficient responses to safety concerns, including the above-referenced disclosures made by Edgar Diaz, a whistleblower at the FAA's San Juan Center Radar Approach Control, San Juan, Puerto Rico (FAA San Juan). As noted in my May 8 letter, I requested that DOT provide updates on the corrective actions outlined in the reports in several of those matters.¹ I have received updated information from DOT regarding its progress in addressing foreign facility deviations (deviations) near Puerto Rico and I am providing you a copy of the update as well as Mr. Diaz's comments on the updated report.²

The agency's update reflects significant improvements in controlling deviations. Nevertheless, I find it disturbing that a promised communications (or shout) line has not yet been installed at FAA San Juan as part of the agency's efforts to enhance safety and aviation communication between San Juan and Santo Domingo.

The 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).

¹ We have received all but one of the updates requested from DOT in my May 8, 2012 letter to you. The updates we have received remain under review by OSC; an update is due on November 16 in the one outstanding matter.

² A foreign facility deviation can occur when an aircraft is flying at an altitude or position different than the one coordinated, or when a foreign aircraft appears on air traffic control radar and flies into U.S. airspace without any prior clearance or authorization.

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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).

In 2008, Mr. Diaz, FAA San Juan Air Traffic Controller (ATC), disclosed that employees failed to respond adequately to deviations, creating a substantial and specific danger to public safety. As a result, the FAA committed in its investigative response to resolve the problem. See OSC File No. DI-08-2954. In May 2011, however, Mr. Diaz returned to OSC with the same allegation. Specifically, Mr. Diaz reported that deviations continued to pose a safety risk to the flying public. He also disclosed that FAA San Juan did not have a "shout line" which would enhance communication between San Juan and Santo Domingo. "Shout lines" act as an intercom between facilities. Although FAA San Juan ATCs can telephone foreign facilities, making contact with these facilities is sometimes delayed until someone answers the telephone line. A shout line allows ATCs to quickly inform the foreign facility that immediate attention is required to manage a flight route.

Although the September 30, 2011 DOT report found that deviations had continued, the rate was significantly reduced compared to previous years and, thus, the agency did not find that there was a substantial and specific danger to public safety.³ The report stated that the agency was nevertheless concerned about deviations and would continue to monitor deviations in conjunction with increased cooperation between FAA and the Dominican Republic. Notwithstanding my determination in May 2011 that the report appeared to be reasonable, I emphasized that I found it troubling that Mr. Diaz was compelled to file the same disclosure a second time. As a result, I requested that DOT provide me with an update in three months on the corrective actions taken to address these safety concerns.

DOT provided me with an updated report dated July 27, 2012, which I enclose with this letter. See Enclosure A. There are positive developments, but also ongoing concerns. Progress is evidenced by the declining trend in deviations near Puerto Rico and ongoing efforts by the agency to track and reduce deviations. The agency has also continued regional discussions regarding aviation safety and deviations, having executed a formal bilateral agreement on July 10, 2012, with the Dominican Republic on radar sharing. However, I am concerned that the promised shout line between FAA San Juan and the Dominican Republic has yet to be established despite a commitment to do so. According to DOT's September 30, 2011 report, the shout line between the San Juan and Santo Domingo facilities was scheduled to be established in early 2012. As of the date of this letter, the shout line is not in place. I recognize FAA's stated concern that political and logistical obstacles may interfere with the efficient establishment of a shout line. However, the lack of a shout line compromises safety to the flying public and must be completed.

³ The September 30, 2011 report stated that in 2009, FAA San Juan recorded 52 foreign facility deviations, 76 in 2010, and 19 in 2011. From January 30, 2012 to May 31, 2012, there were six deviations, but none originating from the Dominican Republic.

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Pursuant to 5 U.S.C. § 1213(e)(1), Mr. Diaz provided comments to DOT's update. See Enclosure B. He agreed with the FAA's updated information based on his disclosures and appreciated that the agency was working on strengthening communication efforts with the Dominican Republic. However, Mr. Diaz stated that he was "concerned" that the shout line was not installed between San Juan and Santa Domingo. I share his concern and, consequently, underscore the importance of Executive and Congressional oversight of FAA's safety initiatives. As stated in my May 8 letter, by law, I am charged with providing you and Congress a report on the resolution of disclosures. OSC does not have a formal continuous oversight role; enforcement action rests with the White House and Congress.

As required by law, 5 U.S.C. § 1213(e)(3), we have sent copies of the update and Mr. Diaz's comments to the Chairman and Ranking Member of the House Committee on Transportation and Infrastructure and the Chairman and Ranking Member of the Senate Committee on Commerce, Science and Transportation. We have also associated the update and Mr. Diaz's comments with the above-referenced closed files and placed the update and whistleblower comments in our public file, which is available online at www.osc.gov.

Respectfully,



Carolyn N. Lerner

Enclosures