

Department of Homeland Security **Office of Inspector General**

Allegations of Misconduct and Illegal Discrimination and Retaliation in the Federal Air Marshal Service



Office of Inspector General

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Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

This report addresses the strengths and weaknesses of the Transportation Security Administration and Federal Air Marshal Service. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in dark ink, appearing to read "Charles K. Edwards".

Charles K. Edwards
Acting Inspector General



Department of Homeland Security
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Executive Summary

In January 2010, CNN reported allegations of misconduct and illegal employment discrimination and retaliation in the Federal Air Marshal Service's Orlando field office. The reports included descriptions of an agency rife with cronyism; age, gender, and racial discrimination; and unfair treatment in promotions, assignments, and discipline. Also included were photographs of a game board modeled after the television show "Jeopardy!" created and displayed by supervisors there, with categories containing derogatory nicknames referring to veterans, females, African-Americans, Hispanics, and lesbians and gays. Senator Bill Nelson and Congressmen Edolphus Towns and Darrell Issa asked us to review the allegations in Orlando and throughout the agency as well as the circumstances surrounding the game board.

Although individual employees may have experienced discrimination or retaliation, our review does not support a finding of widespread discrimination and retaliation within the Federal Air Marshal Service. However, employees' perceptions of discrimination and retaliation are extensive, and we heard too many negative and conflicting accounts of events to dismiss them. Many Federal Air Marshals and some supervisors think they have been discriminated against, fear retaliation, and believe there is much favoritism. There is a great deal of tension, mistrust, and dislike between non-supervisory and supervisory personnel in field offices around the country. We identified factors that contributed to strained relations and became the basis for the allegations. Limited transparency in management decisions is also at the center of fears of retaliation and perceptions that management is mistreating its workforce.

These issues pose a difficult challenge for the agency, but they do not appear to have compromised the service's mission. Transportation Security Administration and Federal Air Marshal Service senior leadership are committed to addressing these issues and have implemented several proactive initiatives to address them. We are making several recommendations to help the agency mitigate these issues.

Background

On September 11, 2001, there were 33 Federal Air Marshals. In November 2001, the Transportation Security Administration (TSA) was created within the U.S. Department of Transportation, and the Federal Air Marshal Service (FAMS) moved from the Federal Aviation Administration to TSA. At that time, the Deputy Secretary of Transportation issued a mandate to recruit, hire, and train thousands of Federal Air Marshals by July 1, 2002.

FAMS met this mandate. To help achieve it, FAMS hired numerous U.S. Secret Service (USSS) retirees because of their experience working in a protective-oriented agency. This was made easier by a provision regarding their federal retirement, which allowed them to continue receiving their federal retirement annuity and a federal law enforcement salary at the same time. TSA also sought experienced retirees from other federal law enforcement agencies. To hire them, TSA requested and obtained waivers of the general restriction prohibiting employees from receiving two federal paychecks at the same time. FAMS eventually received 5-year waivers of the prohibition, and then hired experienced managers from other federal law enforcement agencies. FAMS received more than 175,000 applications and hired Federal Air Marshals from state and local police departments, the Bureau of Prisons, the U.S. military, the U.S. Border Patrol, and other federal law enforcement agencies.

Between 2003 and 2005, FAMS underwent three organizational changes. In March 2003, TSA, including FAMS, moved from the Department of Transportation to the Department of Homeland Security (DHS). In November 2003, FAMS moved within DHS from TSA to U.S. Immigration and Customs Enforcement. In October 2005, it returned to TSA. In June 2008, TSA promoted Robert Bray to Director of FAMS.

FAMS operates many field offices throughout the United States. Field office locations and staffing levels are determined based on intelligence, the FAMS Concept of Operations, and proximity to airports. A Supervisory Air Marshal in Charge (SAC) manages each office, assisted by a Deputy Supervisory Air Marshal in Charge or Assistant Supervisory Air Marshals in Charge (ASACs), depending on the size of the field office, and Supervisory Federal Air Marshals (SFAMs). Federal Air Marshals make up the majority of staff in each field office. Most Federal Air Marshals are deployed on commercial domestic and international flights. A few work in ground-based positions in the field offices to support flying Federal Air Marshals and carry out other responsibilities.

As the size of FAMS increased, workforce issues also increased. The rapid buildup of FAMS, coupled with the task of merging the cultures of the many law enforcement agencies from which Federal Air Marshals were hired, proved to be a challenge. In May 2006, the House Judiciary Committee released an investigative report stating that FAMS encountered numerous problems during the rapid buildup that severely affected morale and potentially national security. The committee reported that Federal Air Marshals in many field offices expressed concerns with policies and reluctance to approach managers due to fear of retaliation. Following the release of this report, the Ranking Member of the House Committee on Homeland Security issued a statement that his committee, which has primary jurisdiction over FAMS, had worked closely with TSA to address flawed policies and practices since FAMS returned to TSA in October 2005. He noted that many of the claims in the report had been or were in the process of being corrected.

In 2009, the U.S. Government Accountability Office (GAO) assessed actions taken by the FAMS to fulfill its mission and address workforce issues. It determined that Director Brown had implemented processes such as working groups and listening sessions to address workforce issues, and Federal Air Marshals were satisfied with these efforts.

FAMS EEO and MSPB Activity

Individual Federal Air Marshals have filed informal and formal Equal Employment Opportunity (EEO) complaints, Merit Systems Protection Board (MSPB) appeals, and lawsuits alleging discrimination, retaliation, or improper personnel actions of one form or another. The majority of cases were decided in the agency's favor. Some were settled prior to the issuance of a decision by the MSPB or the Equal Employment Opportunity Commission (EEOC).

FAMS employees filed 280 informal EEO complaints from September 2006 through May 2010 and 174 formal EEO complaints from September 2006 through April 2011 (see table 1).¹ In fiscal year (FY) 2010, the number of formal complaints rose sharply. For both informal and formal complaints, the primary areas on which employees based their complaints were nonsexual

¹ An informal complaint must be filed initially. Complaints that are not resolved informally may be elevated to the formal complaint process.

harassment, promotion or nonselection, and reprisal. There were three findings of discrimination against FAMS in FY 2009 from claims initiated in 2002, 2004, and 2006, respectively. There was one finding of discrimination against FAMS from September 2009 through January 2010, stemming from a claim initiated in 2004.

Table 1. EEO Complaints Filed by FAMS Employees, FY 2007–FY 2011		
Fiscal Year	Informal Complaints	Formal Complaints
2007	39	18
2008	45	34
2009	49	41
2010	92	71
2011 ¹	55	10
Total	280	174

¹ Informal and formal complaints through April 30, 2011.

From January 2005 through June 2011, FAMS employees filed 161 MSPB appeals. Table 2 provides a breakdown of MSPB appeals filed by calendar year.

Table 2. MSPB Appeals Filed by FAMS Employees, 2005–2011	
Calendar Year	Number of Appeals
2005	10
2006	23
2007	29
2008	26
2009	18
2010	38
2011 ¹	17
Total	161

¹ Number of appeals through June 15, 2011.

Of the 109 cases that had received decisions, 103 (94%) were decided in favor of the agency and 6 (6%) against the agency. Twenty-five cases were settled prior to a decision, and 27 were pending as of June 2011. In July 2011, the MSPB upheld the agency's removal of a Federal Air Marshal in a whistleblower case.

Some Federal Air Marshals have also filed federal lawsuits in U.S. District Courts alleging discrimination and retaliation. From September 2005 to August 2011, 40 lawsuits alleging discrimination by FAMS were filed in U.S. District Courts. The agency won summary judgment or dismissal at the district court level in 22 of the 40 cases. The complainant in one case appealed the district court's decision to summarily dismiss the case, and FAMS then settled the case. Complainants in three other cases also have

appealed the district courts' decisions; the appeals are pending. In addition, 10 cases were settled and 8 are pending.

Discrimination, Retaliation, and Favoritism

Discrimination and retaliation are commonly used terms that when used in legal contexts involve complex matters. Each requires specific elements of evidence to meet its respective legal thresholds. Federal employees and job applicants are protected against discrimination in employment on the basis of race, color, religion, sex (including pregnancy), sexual orientation, national origin, age (40 or older), disability, or genetic information. In addition, federal employers are required to provide a reasonable workplace accommodation for individuals with disabilities and for religious purposes.²

Employees are protected against retaliation for two categories of activities—whistleblowing and exercising their right to engage in certain protected activities. The whistleblower category protects employees, former employees, and applicants for employment against reprisal for lawfully disclosing information they reasonably believe is evidence of a violation of law, rule, or regulation in the workplace or by federal employees. It also protects against reprisal for disclosing gross mismanagement, gross waste of funds, abuse of authority, or substantial or specific danger to public health or safety. The second category protects employees from reprisal for exercising their right to engage in certain protected activities, including the following:

- Filing an appeal, complaint, or grievance;
- Testifying for or assisting another in exercising such a right;
- Cooperating with or disclosing information to the Special Counsel or to an Inspector General; or
- Refusing to obey an order that would require the individual to violate a law.

Sometimes employees believe supervisors have discriminated or retaliated against them by giving preferential treatment to other employees based on biases or personal relationships. If a supervisor gave an assignment to one employee over another because of a personal friendship with that employee, rather than basing the assignment on legitimate business factors such as

² See appendix D for a list of selected laws that protect employees and job applicants against employment discrimination.

expertise, workload, or performance, that would be favoritism. Although what we refer to as favoritism in this report is not the same as discrimination or retaliation, employees are still protected against it; employment decisions must be based on objective factors. An employee might interpret as favoritism what in reality could be fair, merit-based behavior by a supervisor in a given instance. Differentiating among employees based strictly on performance would not be favoritism.

The Allegations

In January 2010, CNN reported allegations of misconduct, illegal discrimination, and retaliation in the FAMS Orlando field office. The reports included descriptions of an agency rife with cronyism; age, gender, and racial discrimination; and unfair treatment in promotions, assignments, and discipline. Also included were two photographs of a "Jeopardy!"-style game board purportedly created and displayed by supervisors in the Orlando field office. One photo depicted the board as it appeared on display in the office; the other was a re-creation of the board with additional descriptions of what the maker believed the game board categories meant. According to the recreated board, categories included derogatory nicknames for a number of groups, including veterans, females, African-Americans, Hispanics, and lesbian and gay employees. After the allegations surfaced, three members of Congress asked us to review allegations of illegal discrimination and retaliation in the Orlando field office and throughout FAMS, as well as the specific circumstances surrounding the creation and use of the offensive game board in Orlando.

Results of Review

Although individual employees may have experienced discrimination or retaliation, our review does not support a finding of widespread discrimination and retaliation within FAMS. However, employees' perceptions of discrimination, retaliation, and favoritism are extensive. Based on personal testimony and data we collected, the agency is facing a difficult challenge. Tension and limited trust between non-supervisory and supervisory personnel, poor communication, and limited transparency are not only damaging morale, but are also at the center of fears of retaliation and perceptions that management is mistreating its workforce.

We did not review individual allegations against supervisors brought to our attention by non-supervisory Federal Air Marshals. Determining whether one employee retaliated or discriminated against another is a

complex matter that may not be resolved until reviewed by the EEOC, MSPB, or a court of law. Beginning in the Orlando field office, we engaged FAMS employees at all levels and at multiple locations around the country to gain a better understanding of how the organization operates and obtain their insights into incidents that have fueled the allegations. One of our challenges was discerning the views of non-supervisory and supervisory Federal Air Marshals and FAMS' senior leadership.

We heard too many negative and conflicting accounts of events to dismiss them. Federal Air Marshals repeatedly portrayed their supervisors as vindictive, aggressive, and guilty of favoritism. At the same time, Federal Air Marshals occasionally appeared to take certain management actions out of context, such as feeling victimized by a policy decision that applied to the entire field office, failing to tell us what we would later discover was the "whole story," or misinterpreting a management decision as harassment. Based on our discussions with senior leadership, supervisors, and non-supervisors, we believe many of the incidents described to us could have been avoided.

We identified numerous factors that contributed to strained relations and became the basis for many allegations of management misconduct (see page 12). We also conducted a survey of the entire FAMS workforce. The survey results echoed what we observed during our site visits (see page 50). One-quarter of respondents feel they have been discriminated against, 47% of respondents fear retaliation, and 55% believe favoritism is tolerated. The survey also revealed that most, but not all, supervisors disagree with non-supervisory Federal Air Marshals' perceptions of these issues.

These issues do not appear to have compromised the FAMS mission. Despite the concerns expressed in field offices, 76% of survey respondents either agreed or strongly agreed that people they work with cooperate to get the job done. However, these allegations add unnecessary distraction at all levels at a time when mission tempo is high and many in the agency are becoming increasingly concerned about workforce burnout and fatigue. Management may not have attained a sufficient degree of transparency yet to mitigate these perceptions, but it has not been for lack of effort. Management has been addressing workforce issues for several years, and continues to take a very proactive approach to solving them (see page 64).

We are making 12 recommendations to address these issues. TSA concurred with all of the recommendations and is formulating plans to implement them. TSA provided written comments on our draft report. We evaluated TSA's comments and made changes to the report where we

deemed appropriate. A copy of TSA's response is included as appendix C.

The Orlando Field Office "Jeopardy!" Board

CNN reported that managers within the FAMS Orlando field office had created a game board styled after the television game show "Jeopardy!" The content of the game board, and a Federal Air Marshal's interpretation of it in the form of a second game board containing more explicit descriptions, was extremely offensive and outraged many Federal Air Marshals, who alleged that field office managers were targeting them. Even though the incident occurred several years ago, news of it brought the agency under further scrutiny and ultimately resulted in changes within the Orlando field office.

We assessed the circumstances surrounding the game board and the field office's response. We conducted interviews of 66 personnel in Orlando and Tampa, including the SAC, every supervisor, one of the employees who created the game board, and numerous non-supervisory Federal Air Marshals. Based on their recollections, the news report appeared to surprise the field office's senior managers. The game board existed only in Orlando, and was not the source of allegations of retaliation and discrimination in other field offices. Federal Air Marshals we interviewed in other field offices had limited knowledge of it.

The game board was created by an SFAM, a Federal Air Marshal, and a civilian training officer in the training office. All three of these individuals have since left FAMS. The Federal Air Marshal, who later became an SFAM and is no longer a Federal Air Marshal, asserted that the game board was used only for several weeks in the spring of 2007, but another employee said it was on display frequently over many months and he last saw it in 2008. The Federal Air Marshal said he and a few others—some but perhaps not all members of the training staff—played the game and that it was used to make fun of those on the training staff, not others. We asked him to explain each of the game board's categories. He could not remember some, and he provided relatively innocuous explanations for others. We interviewed three additional members of the training staff who were knowledgeable about the game board at the time it was displayed. One said the training staff used the game board to make fun of Federal Air Marshals they disliked, including African-Americans, gays and lesbians, and others who had filed complaints against the office. The other two said they saw the board but did not do anything about it.

The former Federal Air Marshal who photographed the game board while it hung in the training office did not show it to members of Congress or the media until after FAMS removed him in December 2009. He said he

drew a second game board, which contained more patently offensive categories, to help the congressional staff understand the original game board's categories better. He emailed images of both game boards to a few Federal Air Marshals in Orlando and Tampa. One or more of those Federal Air Marshals forwarded the email to others on staff. An unidentified Federal Air Marshal distributed paper copies to several Federal Air Marshals via office mailboxes. The recreated game board generated outrage, anger, and sadness. The removal of the Federal Air Marshal who drew the second game board was upheld by the MSPB.

Most of the Orlando field office did not see the game board until it appeared in news media, because the training offices were usually locked and most Federal Air Marshals did not have access to them. Federal Air Marshals felt belittled by the game board because they interpreted one or more of the categories as representing groups to which they belonged. For example, some Federal Air Marshals said the category "Our Gang" referred to African-Americans. They and others who felt targeted by the game board said it provided more proof that management disliked them and it helped explain why they had not received promotions, awards, or international flight assignments, or had been disciplined unjustly. The training staff may have targeted people on the game board, but we found no evidence that using the game board resulted in passing individuals' names to other managers for harsh or inequitable treatment.

We asked personnel in the field office how management responded to the situation. The SAC and the ASACs held a series of briefings about the game boards. Supervisors and non-supervisors confirmed that supervisors described the game board as an improper, sophomoric joke by training staff. However, accounts of managers' attitudes while addressing the matter varied. According to many we interviewed, senior leaders focused on the facsimile game board and were angered that the second game board had been distributed to certain Federal Air Marshals. Managers felt they had responded appropriately. Non-supervisory Federal Air Marshals recalled being disappointed by the briefings because managers came across as insensitive for not expressing accountability, contrition, or appropriate outrage. Several Federal Air Marshals alleged that during one meeting a senior leader commented that 20% of the office staff were excellent, 20% were poor performers and always would be, and the other 60% could go either way. If true, the comment was inappropriate and might suggest there was animosity toward Federal Air Marshals.

This was not the first or only incident driving Federal Air Marshals' allegations of retaliation and discrimination in the Orlando field office. The Orlando field office was under scrutiny prior to the CNN report and the start of our review. In October 2009, TSA's Office of Inspections (OOI) had begun investigating numerous allegations concerning

supervisors' conduct. The basis for its investigation was allegations of misuse of authority or position. TSA OOI completed its Report of Investigation in March 2010 and provided it to TSA and FAMS senior leadership. In February 2010, TSA OOI began a follow-up investigation and completed its Report of Investigation in April 2010. TSA OOI substantiated the allegation that personnel in the Orlando field office training division played the game board. TSA OOI investigators briefed us and we reviewed their reports.

In March 2009, TSA OOI conducted a Management Assessment Program inspection of the Orlando field office, covering the office's activities for 2008. Field offices undergo this inspection every 3 years. As part of the inspection, investigators conducted dozens of interviews in Orlando, and no one mentioned the game board to them.

The environment in the Orlando field office, specifically working relationships between management and non-supervisory Federal Air Marshals, appeared tense. We noted much anxiety among its workforce, and the degree of animosity and mistrust that supervisors and non-supervisors described in interviews was unsettling. Although we spoke to some individuals who said they did not experience or know of any retaliatory actions in the Orlando and Tampa field offices, the majority of non-supervisory Federal Air Marshals expressed fears of retaliation, said they were retaliated against, or cited knowledge of retaliation against others. Many Federal Air Marshals said they feared retaliation from managers for speaking with us and requested anonymity. In addition, at their request we conducted numerous interviews at offsite locations because interviewees did not want to be seen talking to us. One Federal Air Marshal said the last time an Office of Inspector General (OIG) team was there, they thought management retaliated against them for their involvement in those matters. Another Federal Air Marshal believed management was out to "get" him and he would be suspended soon for something, but discipline records do not indicate that a suspension occurred.

Very few Federal Air Marshals in the Orlando field office complained of discrimination. More Federal Air Marshals felt they had been, or feared being, retaliated against by one of the supervisors. Several Federal Air Marshals described the field office as a hostile work environment in which management focuses more on detecting mistakes or violations and punishing Federal Air Marshals rather than supporting and developing staff. The field office has a contingent of Federal Air Marshals who believe they work in a culture in which senior management and supervisors grant promotions, cash awards, pay increases, flight and ground-based assignments, and discipline on the basis of favoritism.

In addition, Federal Air Marshals in Orlando raised concerns that are addressed later in the report, including the need for clear and transparent management decisions. For example, Federal Air Marshals complained about not receiving cash or time-off awards and in-position increases. Federal Air Marshals believe there is no logic to who gets them, and without receiving feedback on their own performance they perceive them to be prejudicial and given to the favorites, especially those in ground-based assignments. It is difficult for flying Federal Air Marshals to demonstrate their abilities because their actual job performance is seldom observed.

Federal Air Marshals also alleged a need for transparency and constructive comments in the promotion process. There were allegations of individuals who were promoted because they were part of management's clique even though they were not as qualified as others or had a record of discipline against them. Some Federal Air Marshals feel they are more qualified than some of those who were promoted and do not understand why they were passed over. Many Federal Air Marshals are disappointed after not being promoted. In addition, Orlando field office managers were the first to describe problems with the promotion process. Without a transparent process and feedback, Federal Air Marshals will continue to feel that favoritism plays a part in management's decisions.

We encountered many instances in which managers and Federal Air Marshals provided conflicting accounts of events and how the agency operates. Like the TSA OOI investigators, we found inconclusive results in several areas. However, the tension between supervisors and Federal Air Marshals was apparent. For example, we reviewed circumstances involving the investigation of a group of Federal Air Marshals for alleged voucher fraud. Many Federal Air Marshals claim the group was ostracized. One manager believes Federal Air Marshals avoided the group because of the ongoing investigation and not because they feared retaliation. In another case, a Federal Air Marshal believes he was coerced into not filing a complaint against a former supervisor. Management denied any coercion.

While we were conducting our site visit, FAMS leadership met with the Orlando SAC at headquarters. In July 2010, the Orlando field office underwent some personnel changes. These included the SAC being reassigned to a position in headquarters. In August 2010, Director Bray met with the entire Orlando field office to address workforce issues. We also met with FAMS senior leadership to discuss the status of disciplinary action within the field office. The individuals who created the game board no longer work for FAMS. In January 2011, the former Orlando SAC retired from FAMS.