



U.S. Immigration
and Customs
Enforcement

October 1, 2007

Mr. Scott J. Bloch
Special Counsel
Office of Special Counsel
1730 M Street, Suite 300
Washington, DC 20036-4505

Re: Investigative Report Concerning Accusations Made Reference OSC File Numbers DI-06-1954, DI-06-2496 and DI-05-2759

Dear Mr. Bloch:

This report is in response to your referral of the above matter regarding alleged misuse of Administratively Uncontrollable Overtime (AUO) and sick leave by employees assigned under the direct supervision of a former U.S. Immigration and Customs Enforcement (ICE) Supervisory Detention and Deportation Officer (SDDO) Henry Lewis, National Fugitive Operations Center, Case Management Unit, Laguna Niguel, California.¹ On May 4, 2007, your office requested the Department make a supplemental inquiry. The Department then referred the matter to the ICE Office of Professional Responsibility (OPR), and designated me as the official responsible for providing your office with a report of the findings pursuant to 5 USC § 1213. A supplemental report was received by the Office of Special Counsel Disclosures Unit on July 25, 2007. On September 6, 2007, the Disclosures Unit requested clarification regarding the supplemental report. As such, this revised supplemental report is submitted in response to this September 6 request. This report is not redacted. As such, please do not disseminate copies of this version of the report to the public. A separate redacted version that may be publicly disseminated has also been provided to your office.

SUMMARY

On May 25, 2006, Jeffery Lybbert, Linda Burke, and a third whistleblower who indicated to OSC the desire to remain anonymous forwarded a complaint to the U.S. Office of Special Counsel (OSC) alleging that ICE SDDO Lewis fraudulently misused AUO and sick leave. The whistleblowers allege that SDDO Lewis has fraudulently misused his AUO in order to maximize his retirement benefits. Furthermore, the whistleblowers allege that SDDO Lewis has improperly used sick leave and plans on using 19 additional days of sick leave prior to his retirement.

¹ The SDDO retired on January 31, 2007.

On October 26, 2006, OSC forwarded these accusations to the Department of Homeland Security (DHS) Secretary Michael Chertoff for investigation.

On December 29, 2006, DHS, OIG, assumed the lead as the investigative agency for the complaint (OIG Complaint No. I07-ICE-LAX-02556).

On April 13, 2007, the DHS, OIG, final report was submitted to OSC pursuant to Title 5 United States Code 1213(c).

On May 4, 2007, the OPR, Special Investigations Unit (SIU), was assigned to investigate specific allegations as specified by the OSC with field investigative work beginning May 16, 2007.

SUMMARY OF ACCUSATIONS

The accusations as contained in the OSC request allege that SDDO Lewis:

- Required Detention and Deportation Officers (DDO) under his supervision to claim the maximum AUO permissible so that it would appear the office remained busy.
- Instructed his employees on how to exhaust sick leave prior to retirement.

INVESTIGATIVE ACTIVITIES

This matter was assigned to the ICE, OPR, SIU, for investigation on May 4, 2007. Subsequent to the case assignment, OPR, SIU, Special Agents conducted preliminary research, data retrieval, and investigative work in preparation for field investigative activities that began on May 16, 2007.

Field investigation, to include appropriate investigative interviews and evidence collection, was conducted at the Fugitive Operations Support Center, Burlington, Vermont (VT), Laguna Niguel, California (CA) and Santa Ana, CA between May 16, 2007, and May 23, 2007. Upon SDDO Lewis' retirement in January of 2007, the office over which SDDO Lewis supervised was closed and the employees who remained were transferred or reassigned. At the time of the field investigation, two of the employees formerly supervised by SDDO Lewis had since left the employment of ICE. The remaining five employees who were formally supervised by SDDO Lewis were interviewed by SIU Special Agents who obtained statements from the following personnel:

DDO Jeffery Lybbert, Burlington, VT
DDO Christina France, Laguna Niguel, CA
Detention and Removal Assistant (DRA) Susan Buening, Laguna Niguel, CA
DRA Linda Burke, Santa Ana, CA
Management and Program Analyst (MPA) Laura Quezada, Laguna Niguel, CA

Of the above-mentioned five employees, DDOs Lybbert and France were AUO eligible. In addition to the interviews outlined above, OPR, SIU, Special Agents obtained documentary evidence, to include the Time and Attendance (T & A) reports from FY 2003 to 2006, related to the AUO submissions of DDOs Lybbert and France to determine if any pertinent evidence was contained therein. Subsequent to the preliminary and field investigative work as outlined above, SIU Special Agents conducted a thorough review and analysis of the documentary evidence recovered and the statements acquired during interviews to determine if the accusations as contained in the OSC request were likely to have occurred.

SUMMARY OF INVESTIGATIVE FINDINGS

Based on a preponderance of the evidence recovered, the OPR, SIU, determined the following:

- SDDO Lewis required his DDOs to claim the maximum AUO permissible so that it would appear the office remained busy. UNFOUNDED
- SDDO Lewis instructed his employees on how to exhaust sick leave prior to retirement. UNSUBSTANTIATED

INVESTIGATIVE FINDINGS

DDOs eligible to receive AUO were not instructed to claim the maximum AUO permissible to give the appearance of a busy office.

SIU Special Agents conducted witness interviews and reviewed documentation relating to AUO submissions by employees previously assigned under the direct supervision of former ICE SDDO Lewis, National Fugitive Operations Center, Case Management Unit, Laguna Niguel, CA.

During the interview of DRA Susan Buening, DRA Buening stated she is not eligible to receive AUO. She stated all DDOs under SDDO Lewis' supervision were eligible to receive AUO. According to DRA Buening, SDDO Lewis expected his employees to perform the maximum AUO possible. DRA Buening had no direct knowledge that SDDO Lewis instructed his employees to claim the maximum AUO permissible, nor was she aware of any employees claiming the maximum AUO. DRA Buening said she performed AUO audits every four pay periods and that SDDO Lewis authorized and signed the audits as supervisor. DRA Buening claimed that she remembered a time when SDDO Lewis was upset with DDO France because she did not want to continue to work AUO. DRA Buening indicated there were times when there was not a sufficient amount of work to warrant AUO, but SDDO Lewis bragged that he claimed 25% AUO.

During the interview of DRA Linda Burke, DRA Burke said she is not eligible to receive AUO. DRA Burke stated that when the office was under the region, SDDO Lewis had a conversation with his employees saying that he expected his officers to work at the 25% level. DRA Burke said most employees were at 25% AUO during that time. DRA Burke said that after DHS took over, most employees either retired or found other positions within Customs

and Border Protection or ICE offices. DRA Burke recalled that at one point DDO France dropped to 15% and 10% AUO and for a short time DDO France went off AUO. DRA Burke said DDO Lybbert also dropped to 10% AUO. DRA Burke stated she did not know first hand if SDDO Lewis instructed anyone to claim the maximum AUO permissible, nor was she aware of any co-workers claiming the maximum AUO per instructions received from SDDO Lewis. DRA Burke added that at the end of his employment, SDDO Lewis claimed 25% AUO when there was no work for him to do.

MPA Laura Quezada stated that she is not eligible to receive AUO, but that all DDOs under SDDO Lewis' supervision were eligible to receive AUO. According to MPA Quezada, SDDO Lewis did not instruct his officers to claim the maximum AUO permissible, but that the officers were influenced to work AUO. MPA Quezada was not aware of any co-workers claiming the maximum AUO as a result of any instruction given by SDDO Lewis. MPA Quezada added she was not aware of what had to be done to claim AUO, but that she knew the officers kept themselves busy.

DDO Jeffery Lybbert stated he was entitled to receive AUO and that he claimed AUO every week. According to DDO Lybbert, SDDO Lewis did not instruct him or anyone else to claim the maximum AUO permissible, but to the contrary was trying to keep the AUO hours the DDOs were claiming to a minimum. DDO Lybbert speculated the hours were being kept to a minimum because SDDO Lewis thought higher AUO percentage claims would hurt the office financially. DDO Lybbert stated that the only one he knew who was claiming the maximum AUO was SDDO Lewis. DDO Lybbert said he wanted to work more AUO, but there was not enough work to perform to warrant more AUO. DDO Lybbert said he did not know of any co-workers paid AUO who may not have warranted it.

DDO Christina France said she was entitled to receive AUO and has claimed AUO since 2005. DDO France said she started at 10% AUO and eventually reached 25% about six months before SDDO Lewis retired. DDO France recalled that when she started in the office she requested that she be allowed 25% AUO because other DDOs in the office were receiving that percentage. DDO France said SDDO Lewis denied her request and she therefore started at either 10% or 15% AUO. DDO France said SDDO Lewis did not instruct her or any of her co-workers to claim the maximum AUO permissible and that SDDO Lewis never encouraged or pressured her to work AUO. DDO France claimed she did not know any co-workers who were paid AUO who did not warrant it.

Investigation by the OPR, SIU, determined that SDDO Lewis, DDO Lybbert, and DDO France were eligible to receive AUO. Both DDOs Lybbert and France indicated that SDDO Lewis never instructed them or anyone else to claim the maximum AUO permissible. In addition, DDOs Lybbert and France claimed that they did not know of any co-workers who were paid AUO that was not warranted. An analysis of Time and Attendance (T&A) records of DDOs Lybbert and France for fiscal years (FY) 2003 through 2006 indicated a variable pattern in the amounts of AUO claimed by both employees. DDOs Lybbert and France never established a regular pattern of claiming 25% AUO. In contrast, a review of SDDO Lewis' T&A records for FY 2003 through 2006 revealed a consistent pattern of 25% AUO claimed for every pay period. During the investigation both DDOs Lybbert and France described assignments and

activities which, in and of themselves, would not have entitled them to payment of AUO. However, the investigation did not reveal the remaining duties to which DDOs Lybbert and France were assigned; therefore, the investigation is not conclusive as to whether DDOs Lybbert and France were receiving improper amounts of AUO.

Employees were not instructed on how to exhaust sick leave prior to retirement.

Special Agents assigned to the OPR, SIU, conducted witness interviews relating to the use of sick leave. DRA Buening stated that she overheard a telephone conversation between SDDO Lewis and an unknown individual during which SDDO Lewis was explaining that they needed their supervisor's signature in advance and not to create a recognizable pattern when using sick leave. DRA Buening said SDDO Lewis intended to use a large amount of sick leave prior to his retirement but curtailed his plans due to employee suspicions.

According to DRA Burke, SDDO Lewis never instructed her on how to use sick leave before retirement, but did recall SDDO Lewis making a statement that it was ok to burn sick leave before you retire. DRA Burke indicated she is not aware of any co-worker using sick leave in preparation for retirement.

MPA Quezada stated that SDDO Lewis never instructed her on how to use sick leave before retirement. According to MPA Quezada, she was only aware of one DDO who was frequently out on sick leave close to his retirement, but she did not know if it was in preparation for retirement or not.

DDO Lybbert claimed SDDO Lewis never instructed him on how to use sick leave before retirement. According to DDO Lybbert, he has not used sick leave in preparation for his own retirement. DDO Lybbert stated that both his sick and annual leave balances have never been much. DDO Lybbert claimed that caring for his wife in addition to managing a large family caused him to use the majority of his sick and annual leave.

DDO France said SDDO Lewis never instructed her on how to use sick leave before retirement, but she did hear SDDO Lewis bragging about how he was going to burn up sick leave before he retired. DDO France stated she has never used sick leave in preparation for her retirement nor does she know of any co-workers who have used sick leave for that specific purpose.

Investigation by the OPR, SIU, did not clearly establish whether SDDO Lewis instructed his employees on how to exhaust sick leave prior to retirement. Of five employees interviewed, four stated that SDDO Lewis never instructed them on how to use sick leave before retirement. In contrast, one witness overheard a phone conversation in which SDDO Lewis instructed an unknown individual not to create a recognizable pattern when using sick leave and another witness recalled SDDO Lewis saying that it was ok to burn sick leave before you retire.

SDDO Lewis retired with a sick leave balance of 1652 hours and an annual leave balance of 405 hours. The remaining sick leave balance added nine months and fifteen days time in

service for purposes of calculating his retirement annuity.

CORRECTIVE ACTION

The original OIG investigation regarding the allegations that SDDO Lewis improperly claimed AUO in order to maximize his retirement benefits and improperly exhausted his sick leave prior to his impending retirement was inconclusive but uncovered possible violations of: Title 18 U.S.C. § 1001 Statements or Entries Generally; Title 5 U.S.C. § 5545(c)(2) Night, Standby, Irregular and Hazardous Duty Differential; Title 5 C.F.R. § 550.151 Authorization of Premium Pay on an Annual Basis; Title 5 C.F.R. §550.161(b) Responsibilities of the Agencies; and Title 5 C.F.R. § 630.401 Grant of Sick Leave.

As mentioned in the April 13, 2007, OIG report, the DHS OIG briefed Elyssa Getreu, Assistant United States Attorney of the Central District of California. Ms. Getreu declined prosecution of SDDO Lewis due to insufficient evidence.

DHS will not make attempts to garnish SDDO Lewis' annuity payments, adjust the annuity payments, or institute collection proceedings against SDDO Lewis for overpayment of AUO as there is insufficient evidence to determine the actual amount of AUO to which SDDO Lewis was entitled. If DHS were to select an arbitrary percentage of AUO, the Department would open itself up to significant liability as there is no evidentiary basis to determine the appropriate amount of AUO. This type of significant litigation risk could end up costing more taxpayer dollars than the cost of the misuse of AUO. Furthermore, one of the DDOs who described performing assignments and activities which would not necessarily have qualified him for AUO was a whistleblower in this matter. Similarly, there is not sufficient evidence to establish the amount of AUO to which DDO Lybbert was eligible. DHS treats all employees, both current and former, in a consistent manner. As such, any action taken against SDDO Lewis would also have to be taken against DDO Lybbert. The Department has extreme concern with taking such an adverse action against a whistleblower.

CORRECTIVE RECOMMENDATIONS

Following the initial investigation into these matters conducted by the DHS OIG, OIG completed a Management Implication Report (MIR) in order to address the deficiencies so noted in the initial investigation. The two systemic deficiencies revealed by the initial OIG investigation were found to be: (1) AUO is being paid to employees within ICE who do not meet the requirements to receive the premium pay and (2) ICE employees under the Civil Service Retirement System (CSRS) are using sick leave for non-medical purposes just prior to retirement. As such, OIG made the following recommendations, with which OPR concurs, in the MIR:

Recommendation #1

It is recommended that ICE more stringently hold first-line supervisors accountable for the annual certification of AUO. Former Immigration and Naturalization Service positions, like the DDOs, traditionally were qualified for AUO; however, with the creation of DHS and the

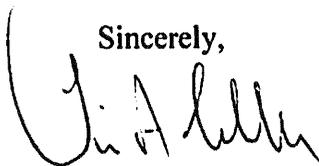
merger of INS and the United States Customs Service, responsibilities and duties changed within the newly formed agency. The Code of Federal Regulations requires supervisors to evaluate and annually certify that a position is qualified to receive AUO. If a position no longer qualifies as AUO, it is the first-line supervisor's responsibility to decertify the position. ICE needs to re-evaluate the positions within the agency that are certified to receive AUO and determine if the premium pay is still warranted for those positions.

Recommendation # 2

It is recommended that ICE more stringently hold first-line supervisors accountable for employee's use of sick leave. Title 5 of the Code of Federal Regulations § 630.401 specifies six situations for which sick leave can be granted. "Burning" sick leave prior to the retirement is not one of the approved situations. In the instant case, SDDO Lewis claimed his first-line supervisor knew that he was "burning" sick leave due to an impending retirement and approved the sick leave. ICE needs to train first-line supervisors that despite common practices of the past, "burning" sick leave prior to retirement does not comport with federal regulations.

If you should require further information regarding these issues, please contact me at (202) 514-5765.

Sincerely,



Traci Lembke

Director

Office of Professional Responsibility

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U.S. Immigration
and Customs
Enforcement

September 24, 2007

Mr. Scott J. Bloch
Special Counsel
Office of Special Counsel
1730 M Street, Suite 300
Washington, DC 20036-4505

Re: Investigative Report Concerning Accusations Made Reference OSC File Numbers DI-06-1954, DI-06-2496 and DI-05-2759

Dear Mr. Bloch:

This report is in response to your referral of the above matter regarding alleged misuse of Administratively Uncontrollable Overtime (AUO) and sick leave by employees assigned under the direct supervision of a former U.S. Immigration and Customs Enforcement (ICE) Supervisory Detention and Deportation Officer (SDDO), National Fugitive Operations Center, Case Management Unit, Laguna Niguel, California.¹ On May 4, 2007, your office requested the Department make a supplemental inquiry. The Department then referred the matter to the ICE Office of Professional Responsibility (OPR), and designated me as the official responsible for providing your office with a report of the findings pursuant to 5 USC § 1213. A supplemental report was received by the Office of Special Counsel Disclosures Unit on July 25, 2007. On September 6, 2007, the Disclosures Unit requested clarification regarding the supplemental report. As such, this revised supplemental report is submitted in response to this September 6 request.

SUMMARY

On May 25, 2006, three whistleblowers forwarded a complaint to the U.S. Office of Special Counsel (OSC) alleging that the ICE SDDO fraudulently misused AUO and sick leave. The whistleblowers allege that the SDDO has fraudulently misused his AUO in order to maximize his retirement benefits. Furthermore, the whistleblowers allege that the SDDO has improperly used sick leave and plans on using 19 additional days of sick leave prior to his retirement.

On October 26, 2006, OSC forwarded these accusations to the Department of Homeland Security (DHS) Secretary Michael Chertoff for investigation.

¹ The SDDO retired on January 31, 2007.

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On May 4, 2007, the OPR, Special Investigations Unit (SIU), was assigned to investigate specific allegations as specified by the OSC with field investigative work beginning May 16, 2007.

SUMMARY OF ACCUSATIONS

The accusations as contained in the OSC request allege that the SDDO:

- Required Detention and Deportation Officers (DDO) under his supervision to claim the maximum AUO permissible so that it would appear the office remained busy.
- Instructed his employees on how to exhaust sick leave prior to retirement.

INVESTIGATIVE ACTIVITIES

This matter was assigned to the ICE, OPR, SIU, for investigation on May 4, 2007. Subsequent to the case assignment, OPR, SIU, Special Agents conducted preliminary research, data retrieval, and investigative work in preparation for field investigative activities that began on May 16, 2007.

Field investigation, to include appropriate investigative interviews and evidence collection, was conducted at the Fugitive Operations Support Center, Burlington, Vermont (VT), Laguna Niguel, California (CA) and Santa Ana, CA between May 16 2007, and May 23, 2007. Upon the SDDO's retirement in January of 2007, the office over which the SDDO supervised was closed and the employees who remained were transferred or reassigned. At the time of the field investigation, two of the employees formerly supervised by the SDDO had since left the employment of ICE. The remaining five employees who were formally supervised by the SDDO were interviewed by SIU Special Agents who obtained statements from the following personnel:

DDO A, Burlington, VT²
DDO B, Laguna Niguel, CA
Detention and Removal Assistant (DRA) Laguna Niguel, CA
DRA, Santa Ana, CA
Management and Program Analyst (MPA) Laguna Niguel, CA

Of the above-mentioned five employees, DDOs A and B were AUO eligible. In addition to the interviews outlined above, OPR, SIU, Special Agents obtained documentary evidence, to

² Names replaced to preserve the privacy of the witnesses.

include the Time and Attendance (T & A) reports from FY 2003 to 2006, related to the AUO submissions of DDOs A and B to determine if any pertinent evidence was contained therein. Subsequent to the preliminary and field investigative work as outlined above, SIU Special Agents conducted a thorough review and analysis of the documentary evidence recovered and the statements acquired during interviews to determine if the accusations as contained in the OSC request were likely to have occurred.

SUMMARY OF INVESTIGATIVE FINDINGS

Based on a preponderance of the evidence recovered, the OPR, SIU, determined the following:

- The SDDO required his DDOs to claim the maximum AUO permissible so that it would appear the office remained busy. UNFOUNDED
- The SDDO instructed his employees on how to exhaust sick leave prior to retirement. UNSUBSTANTIATED

INVESTIGATIVE FINDINGS

DDOs eligible to receive AUO were not instructed to claim the maximum AUO permissible to give the appearance of a busy office.

SIU Special Agents conducted witness interviews and reviewed documentation relating to AUO submissions by employees previously assigned under the direct supervision of the former ICE SDDO, National Fugitive Operations Center, Case Management Unit, Laguna Niguel, CA.

During the interview of the DRA from Laguna Niguel, the DRA stated she is not eligible to receive AUO. She stated all DDOs under the SDDO's supervision were eligible to receive AUO. According to the DRA, the SDDO expected his employees to perform the maximum AUO possible. The DRA had no direct knowledge that the SDDO instructed his employees to claim the maximum AUO permissible, nor was she aware of any employees claiming the maximum AUO. The DRA said she performed AUO audits every four pay periods and that the SDDO authorized and signed the audits as supervisor. The DRA claimed that she remembered a time when the SDDO was upset with DDO B because DDO B did not want to continue to work AUO. The DRA indicated there were times when there was not a sufficient amount of work to warrant AUO, but SDDO bragged that he claimed 25% AUO.

During the interview of the DRA from Santa Ana, the DRA said she is not eligible to receive AUO. The DRA stated that when the office was under the region, the SDDO had a conversation with his employees saying that he expected his officers to work at the 25% level. The DRA said most employees were at 25% AUO during that time. The DRA said that after DHS took over, most employees either retired or found other positions within Customs and Border Protection or ICE offices. The DRA recalled that at one point DDO B dropped to 15% and 10% AUO and for a short time DDO B went off AUO. The DRA said DDO A also dropped to 10% AUO. The DRA stated she did not know first hand if the SDDO instructed anyone to claim the maximum AUO permissible, nor was she aware of any co-workers

claiming the maximum AUO per instructions received from the SDDO. The DRA added that at the end of his employment, the SDDO claimed 25% AUO when there was no work for him to do.

The MPA stated that she is not eligible to receive AUO, but that all DDOs under the SDDO's supervision were eligible to receive AUO. According to the MPA, the SDDO did not instruct his officers to claim the maximum AUO permissible, but that the officers were influenced to work AUO. The MPA was not aware of any co-workers claiming the maximum AUO as a result of any instruction given by the SDDO. The MPA added she was not aware of what had to be done to claim AUO, but that she knew the officers kept themselves busy.

DDO A stated he was entitled to receive AUO and that he claimed AUO every week. According to DDO A, the SDDO did not instruct him or anyone else to claim the maximum AUO permissible, but to the contrary was trying to keep the AUO hours the DDOs were claiming to a minimum. DDO A speculated the hours were being kept to a minimum because the SDDO thought higher AUO percentage claims would hurt the office financially. DDO A stated that the only one he knew who was claiming the maximum AUO was the SDDO. DDO A said he wanted to work more AUO, but there was not enough work to perform to warrant more AUO. DDO A said he did not know of any co-workers paid AUO who may not have warranted it

DDO B said she was entitled to receive AUO and has claimed AUO since 2005. DDO B said she started at 10% AUO and eventually reached 25% about six months before the SDDO retired. DDO B recalled that when she started in the office she requested that she be allowed 25% AUO because other DDOs in the office were receiving that percentage. DDO B said the SDDO denied her request and she therefore started at either 10% or 15% AUO. DDO B said the SDDO did not instruct her or any of her co-workers to claim the maximum AUO permissible and that the SDDO never encouraged or pressured her to work AUO. DDO B claimed she did not know any co-workers who were paid AUO who did not warrant it.

Investigation by the OPR, SIU, determined that the SDDO, DDO A and DDO B were eligible to receive AUO. Both DDOs A and B indicated that the SDDO never instructed them or anyone else to claim the maximum AUO permissible. In addition, DDOs A and B claimed that they did not know of any co-workers who were paid AUO that was not warranted. An analysis of Time and Attendance (T&A) records of DDOs A and B for fiscal years (FY) 2003 through 2006 indicated a variable pattern in the amounts of AUO claimed by both employees. DDOs A and B never established a regular pattern of claiming 25% AUO. In contrast, a review of the SDDO's T&A records for FY 2003 through 2006 revealed a consistent pattern of 25% AUO claimed for every pay period. During the investigation both DDOs A and B described assignments and activities which, in and of themselves, would not have entitled them to payment of AUO. However, the investigation did not reveal the remaining duties to which DDOs A and B were assigned; therefore, the investigation is not conclusive as to whether DDOs A and B were receiving improper amounts of AUO.

Employees were not instructed on how to exhaust sick leave prior to retirement.

Special Agents assigned to the OPR, SIU, conducted witness interviews relating to the use of sick leave. The DRA from Laguna Niguel stated that she overheard a telephone conversation between the SDDO and an unknown individual during which the SDDO was explaining that they needed their supervisor's signature in advance and not to create a recognizable pattern when using sick leave. The DRA said the SDDO intended to use a large amount of sick leave prior to his retirement but curtailed his plans due to employee suspicions.

According to the DRA from Santa Ana, the SDDO never instructed her on how to use sick leave before retirement, but did recall the SDDO making a statement that it was ok to burn sick leave before you retire. The DRA indicated she is not aware of any co-worker using sick leave in preparation for retirement.

The MPA stated that the SDDO never instructed her on how to use sick leave before retirement. According to the MPA, she was only aware of one DDO who was frequently out on sick leave close to his retirement, but she did not know if it was in preparation for retirement or not.

DDO A claimed the SDDO never instructed him on how to use sick leave before retirement. According to DDO A, he has not used sick leave in preparation for his own retirement. DDO A stated that both his sick and annual leave balances have never been much. DDO A claimed that caring for his wife in addition to managing a large family caused him to use the majority of his sick and annual leave.

DDO B said the SDDO never instructed her on how to use sick leave before retirement, but she did hear the SDDO bragging about how he was going to burn up sick leave before he retired. DDO B stated she has never used sick leave in preparation for her retirement nor does she know of any co-workers that have used sick leave for that specific purpose.

Investigation by the OPR, SIU, did not clearly establish whether the SDDO instructed his employees on how to exhaust sick leave prior to retirement. Of five employees interviewed, four stated that the SDDO never instructed them on how to use sick leave before retirement. In contrast, one witness overheard a phone conversation in which the SDDO instructed an unknown individual not to create a recognizable pattern when using sick leave and another witness recalled the SDDO saying that it was ok to burn sick leave before you retire.

The SDDO retired with a sick leave balance of 1652 hours and an annual leave balance of 405 hours. The remaining sick leave balance added nine months and fifteen days time in service for purposes of calculating his retirement annuity.

CORRECTIVE ACTION

The original OIG investigation regarding the allegations that the SDDO improperly claimed AUO in order to maximize his retirement benefits and improperly exhausted his sick leave prior to his impending retirement was inconclusive but uncovered possible violations of: Title

18 U.S.C. § 1001 Statements or Entries Generally; Title 5 U.S.C. § 5545(c)(2) Night, Standby, Irregular and Hazardous Duty Differential; Title 5 C.F.R. § 550.151 Authorization of Premium Pay on an Annual Basis; Title 5 C.F.R. §550.161(b) Responsibilities of the Agencies; and Title 5 C.F.R. § 630.401 Grant of Sick Leave.

As mentioned in the April 13, 2007, OIG report, the DHS OIG briefed Elyssa Getreu, Assistant United States Attorney of the Central District of California. Ms. Getreu declined prosecution of the SDDO due to insufficient evidence.

DHS will not make attempts to garnish the SDDO's annuity payments, adjust the annuity payments, or institute collection proceedings against the SDDO for overpayment of AUO as there is insufficient evidence to determine the actual amount of AUO to which the SDDO was entitled. If DHS were to select an arbitrary percentage of AUO, the Department would open itself up to significant liability as there is no evidentiary basis to determine the appropriate amount of AUO. This type of significant litigation risk could end up costing more taxpayer dollars than the cost of the misuse of AUO. Furthermore, one of the DDOs who described performing assignments and activities which would not necessarily have qualified the DDO for AUO was a Whistleblower in this matter. Similarly, there is not sufficient evidence to establish the amount of AUO to which this DDO was eligible. DHS treats all employees, both current and former, in a consistent manner. As such, any action taken against the SDDO would also have to be taken against the DDO. The Department has extreme concern with taking such an adverse action against Whistleblowers.

CORRECTIVE RECOMMENDATIONS

Following the initial investigation into these matters conducted by the DHS OIG, OIG completed a Management Implication Report (MIR) in order to address the deficiencies so noted in the initial investigation. The two systemic deficiencies revealed by the initial OIG investigation were found to be: (1) AUO is being paid to employees within ICE who do not meet the requirements to receive the premium pay and (2) ICE employees under the Civil Service Retirement System (CSRS) are using sick leave for non-medical purposes prior to retirement. As such, OIG made the following recommendations, with which OPR concurs, in the MIR:

Recommendation #1

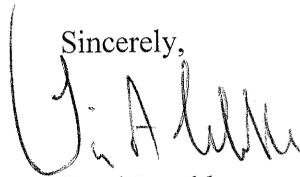
It is recommended that ICE more stringently hold first-line supervisors accountable for the annual certification of AUO. Former Immigration and Naturalization Service positions, like the DDOs, traditionally were qualified for AUO; however, with the creation of DHS and the merger of INS and the United States Customs Service, responsibilities and duties changed within the newly formed agency. The Code of Federal Regulations requires supervisors to evaluate and annually certify that a position is qualified to receive AUO. If a position no longer qualifies as AUO, it is the first-line supervisor's responsibility to decertify the position. ICE needs to re-evaluate the positions within the agency that are certified to receive AUO and determine if the premium pay is still warranted for those positions.

Recommendation # 2

It is recommended that ICE more stringently hold first-line supervisors accountable for employee's use of sick leave. Title 5 of the Code of Federal Regulations § 630.401 specifies six situations for which sick leave can be granted. "Burning" sick leave prior to the retirement is not one of the approved situations. In the instant case, the SDDO claimed his first-line supervisor knew that the SDDO was "burning" sick leave due to an impending retirement and approved the sick leave. ICE needs to train first-line supervisors that despite common practices of the past, "burning" sick leave prior to retirement does not comport with federal regulations.

If you should require further information regarding these issues, please contact me at (202) 514-5765.

Sincerely,



Traci Lembke

Director

Office of Professional Responsibility