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The Special Counsel

February 7, 2008

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

Re: OSC File Nos. DI-06-1954; DI-06-2496; DI-06-2759

Dear Mr. President:

I received a disclosure from three whistleblowers alleging that an employee fraudulently misused sick leave and Administratively Uncontrollable Overtime (AUO) in an effort to maximize his retirement benefits at the Department of Homeland Security, Immigration and Customs Enforcement (ICE), National Fugitive Operations Center, Case Management Unit, Laguna Niguel, California. The whistleblowers, Jeffrey Lybbert, Detention and Deportation Officer, and Linda Burke, Detention and Removal Assistant, who consented to the release of their names, and a third whistleblower, who requested anonymity, disclosed that Henry Lewis, Supervisory Detention and Deportation Officer, abused sick leave and improperly claimed AUO.

On October 26, 2006, I required the Honorable Michael Chertoff, Secretary of Homeland Security, to conduct an investigation into the whistleblowers' disclosures pursuant to 5 U.S.C. § 1213(c) and (d). The Secretary tasked the Office of the Under Secretary of Management who directed the Office of Inspector General (OIG) and, subsequently, the Office of Professional Responsibility (OPR), to conduct investigations and to submit written reports. The agency submitted a redacted report on September 24, 2007, which was prepared by Traci Lembke, Director, DHS Office of Professional Responsibility (OPR). Ms. Lembke subsequently submitted an unredacted report on October 1, 2007. While the report found that there was insufficient evidence to establish the specific amount of overtime and sick leave hours for which Mr. Lewis was improperly paid, it reflects that agency officials have taken steps to address issues associated with AUO and sick leave, as discussed in detail below.

Specifically, the whistleblowers alleged that since the reorganization and integration of the Detention and Removal Operations as a component of ICE in March 2003, the Laguna Niguel office experienced a steady decrease in work.¹ The decrease in work was so pronounced that the majority of the Detention and Deportation Officers reportedly found other positions. Nonetheless, the whistleblowers disclosed that their supervisor, Mr. Lewis, continued to claim the maximum AUO permissible and required other Detention and Deportation Officers under his supervision to work overtime hours at certain times so that it would appear that the office remained busy. The whistleblowers explained that Mr. Lewis maximized AUO in order to capitalize on his "high-3" average pay for purposes of computing retirement benefits.

¹ The ICE office in question, located in Laguna Niguel, California, is now permanently closed.

The agency investigation into Mr. Lewis' improperly claimed AUO and sick leave prior to his impending retirement was inconclusive, but uncovered possible violations of: 18 U.S.C. § 1001 Statements or Entries Generally; 5 U.S.C. § 5545(c)(2) Night, Standby, Irregular and Hazardous Duty Differential; 5 C.F.R. § 550.151 Authorization of Premium Pay on an Annual Basis; 5 C.F.R. §550.161(b) Responsibilities of the Agencies; and 5 C.F.R. § 630.401 Grant of Sick Leave. Consequently, on December 21, 2006, DHS OIG contacted the Office of the United States Attorney (USAO) of the Central District of California. After being briefed by telephone about Mr. Lewis' AUO and sick leave issues, the USAO said that there was insufficient information to proceed with a further investigation.

During the agency investigation, Mr. Lewis retired from his position on January 31, 2007. Because there was no evidentiary basis regarding the amount of improperly paid AUO, DHS could not institute collection proceedings against Mr. Lewis. However, following the investigation into these matters, OIG completed a Management Implication Report (MIR) in order to address concerns arising from its investigation. The OIG investigation found the following systemic deficiencies: (1) some ICE employees were possibly paid overtime or premium pay improperly and (2) some ICE employees under the Civil Service Retirement System (CSRS) may have been using sick leave for non-medical purposes prior to retirement. As such, OIG made the following recommendations, with which OPR concurred, in its MIR:

1. It is recommended that ICE more stringently hold first-line supervisors accountable for the annual certification of AUO. 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.
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 retirement is not one of the approved situations. In the instant case, Mr. Lewis claimed his first-line supervisor knew that he was "burning" sick leave due to an impending retirement and approved the sick leave. ICE, therefore, 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.

The whistleblowers also had an opportunity to review and comment on the agency report. Mr. Lybbert stated that he disagreed with the agency report that indicated that he was ineligible for AUO. Mr. Lybbert stated that because he was working on law enforcement tasks, including a law enforcement database, he was eligible for AUO. He also clarified that Mr. Lewis did not instruct current employees to "burn" their sick leave, but rather advised former employees whom he favored about the benefits of "burning" sick leave. Ms. Burke lamented over the fact that more could not be done to address Mr. Lewis' improper earning of AUO, even though he has

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since retired. The anonymous whistleblower elected not to submit comments. As required by law, 5 U.S.C. § 1213(e)(3), I am now transmitting the agency report along with Mr. Lybbert's and Ms. Burke's comments to you.

I have reviewed the original disclosures, the agency report, and the whistleblowers' comments. I support the recommendations made in the MIR. It is imperative that ICE managers adhere to regulations that require them to monitor and evaluate the use of AUO and sick leave in order to determine whether it is warranted and justified. Indeed, such monitoring of employee premium pay and sick leave is a fundamental responsibility of any manager. Based on my review, I have determined that the agency's report contains all of the information required by statute, and that its findings appear to be reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent a copy of the agency report and the whistleblowers' comments to the Chairman of the Senate Committee on Homeland Security and Governmental Affairs and to the Chairman of the House Committee on Homeland Security. I have also filed copies of the agency's redacted report and the whistleblowers' comments in our public file and closed the matter.

Respectfully,



Scott J. Bloch

Enclosures