U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and
Border Protection

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

AUG 14 2008

RE: OSC File No. DI-08-0663

Dear Mr. Bloch:

The attached report is in response to your referral of the above-captioned matter regarding alleged improper use of administratively uncontrollable overtime by supervisors and staff at the U.S. Customs and Border Protection (CBP), Office of Border Patrol, Lynden Station, Lynden, WA and Blaine Sector Headquarters, Blaine, WA. The Secretary referred this inquiry to the Department of Homeland Security, CBP, Internal Affairs and designated me as the official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213. The Department's findings are included in the attached report. This version of the report is not meant for public viewing. A separate redacted version of the report is also attached for public dissemination.

Please do not hesitate to contact my office should you require further information regarding these matters at (202) 344-1800.

Sincerely,

James F. Tomsheck
Assistant Commissioner
Office of Internal Affairs

cc: Secretary
Deputy Secretary
Under Secretary for Management
Commissioner, U.S. Customs and Border Protection

OSC FILE Number DI-08-0663

1. SUMMARY OF THE INFORMATION WHICH FORMED THE BASIS FOR THE INVESTIGATION

Supervisory Sector Enforcement Specialist (SSES), Kenneth E. Downey alleged to the Office of Special Counsel (OSC) that Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) employees assigned to Office of Border Patrol (OBP), Lynden Station, Lynden, WA, were improperly paid Administratively Uncontrollable Overtime (AUO). In addition, he alleged that specific senior managers at Blaine Sector Headquarters, Blaine, WA, received AUO pay for duties he alleged were administrative and managerial in nature. Based on these allegations, OSC determined that if true, there was a substantial likelihood that these payments constituted a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority.

On February 20, 2008, the OSC referred these allegations and request for investigation to DHS Secretary Michael Chertoff. On March 18, 2008, the matter was assigned to CBP, Office of Internal Affairs (IA), for investigation. Field investigative work began on April 16, 2008, at the CBP-IA, Bellingham, WA.

The allegations contained in the OSC letter of February 20, 2008, are summarized as follows:

- Misuse of AUO pay by OBP senior managers at the Blaine Sector Headquarters, Blaine, WA, and supervisory and non-supervisory OBP agents at the Lynden Station, Lynden, WA. This results in improperly paid AUO in violation of 5 C.F.R. 550.151-163; and the CBP Payroll Systems Handbook 53010-019, Chapter 8.
    - Specifically, senior managers at the OBP Blaine Sector Headquarters currently and in the past[1] improperly benefited from regularly approved AUO overtime pay by claiming two hours nearly every work day for work that is not administratively uncontrollable as required by regulations and the work is administrative in nature.
    - Specifically, OBP Lynden Station supervisory and non-supervisory OBP agents currently and in the past improperly benefited from regularly approved AUO overtime pay by claiming two hours nearly every work day for work that is not administratively uncontrollable as required by regulations.

- The systemic abuse of AUO pay by OBP suggests that OBP managers are committing a violation of law, rule or regulation, gross mismanagement and a gross waste of funds.

2. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

CBP-IA agents from the Bellingham, Washington, Office of the Resident Agent in Charge, conducted investigative interviews and obtained relevant evidence at the OBP, Blaine Sector Headquarters, and the OBP Lynden Station between May 12, 2008, and May 22, 2008. Form G-259a Duty Assignment Sheets, Form G-481 Daily Unit Assignment Logs, local time and attendance sheets, and other documents were obtained and reviewed. In addition, the following references were consulted for guidance:

U.S. Customs Service (now CBP) Payroll System Handbook, (June 1993)
Title 5, Code of Federal Regulations
INS Policy Statement 1.3.103 Administratively Uncontrollable Overtime Pay, (January 2000)
INS Administrative Procedures Manual 1.3.103 Administratively Uncontrollable Overtime Pay, January 2000
INS Administratively Uncontrollable Overtime Training Guide, September 22, 1997
U.S. Customs Service Directive No. 51550-004A, Administrative Uncontrollable Overtime, June 29, 2000
U.S. Customs and Border Protection 2006 Payroll Time and Attendance Manual
Border Patrol Memorandum, Use of Administratively Uncontrollable Overtime (AUO) at Checkpoints, dated January 14, 2008.
Time and attendance files, payroll records from the National Finance Center (NFC)

1 The whistleblower identified the relevant time period in the past to be October 31, 2005 through July, 2006.

Time and attendance files, time and attendance records from the CBP Overtime Scheduling System (COSS)

The CBP National Finance Center (NFC) extracted electronic records from the CBP payroll systems and provided data worksheets for the OBP personnel at the Sector Headquarters and a representative sample of personnel at the Lynden Station[2]. CBP-IA Integrity Programs Division (IPD) Operational Analysis Specialists conducted research utilizing the CBP Overtime Scheduling System (COSS[3]) which OBP uses to process its payroll. The CBP Office of Human Resources (HRM) provided relevant policy statements and consultation on the proper use and receipt of AUO.

The following employees were interviewed, and each provided a sworn statement:

- Supervisory Sector Enforcement Specialist (SSES) Kenneth E. Downey, Blaine Sector
- Chief Patrol Agent (CPA) [redacted]
- Deputy Chief Patrol Agent (DCPA) [redacted], Blaine Sector
- Assistant Chief Patrol Agent (ACPA) [redacted], Blaine Sector
- Assistant Chief Patrol Agent (ACPA) [redacted], Blaine Sector
- Assistant Chief Patrol Agent (ACPA) [redacted], Blaine Sector
- Special Operations Supervisor (SOS) [redacted], Blaine Sector
- Patrol Agent in Charge (PAIC) [redacted], Lynden Station
- Field Operations Supervisor (FOS) [redacted], Lynden Station
- Field Operations Supervisor (FOS) [redacted], Lynden Station
- Supervisory Patrol Agent (SPA) [redacted], Lynden Station
- Supervisory Patrol Agent (SPA) [redacted], Lynden Station
- Supervisory Patrol Agent (SPA) [redacted], Lynden Station
- Supervisory Patrol Agent (SPA) [redacted], Lynden Station
- Patrol Agent (PA) [redacted], Lynden Station
- Patrol Agent (PA) [redacted], Lynden Station
- Patrol Agent (PA) [redacted], Lynden Station
- Patrol Agent (PA) [redacted], Lynden Station
- Patrol Agent (PA) [redacted], Lynden Station

3. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION

The investigation confirmed the following allegations made by SSES Downey:

- Senior managers at the Blaine Sector benefited from improperly and regularly approved AUO overtime. The AUO overtime documented and claimed is controllable and administrative in nature.

- Overtime at the Lynden Station appears to be improperly paid as AUO. The majority of the overtime work performed is inconsistent with AUO qualifying duties and is controllable.

In addition, the investigation revealed that AUO is not properly documented or certified as required by regulation and agency policy.

2 The NFC provided comprehensive data queries for all Blaine Sector Headquarters Senior personnel and a sample of 14 Lynden Station personnel.

3 COSS came online in 1998; five years after the CBP Payroll System Handbook was issued. Procedurally, employees or timekeepers input employee payroll information, including overtime and compensatory time, into COSS. After certification by an employee's supervisor, the payroll information is submitted to the U.S. Department of Agriculture (USDA) payroll office for processing. The CBP Payroll System Handbook has not been updated since COSS' inception.

4. INVESTIGATIVE FINDINGS

Background

The Blaine Sector Border Patrol office is comprised of approximately 145 uniformed personnel, seven (7) support personnel, and eight (8) radio communications employees. From May 2001 through April 2007, former Chief Patrol Agent (CPA) [redacted] supervised the Blaine Border Patrol Sector. Former CPA Henley retired effective April 28, 2007, and DCPA [redacted] served as the Acting CPA. On August 15, 2007, Chief Patrol Agent [redacted] was selected as the Chief Patrol Agent for the Blaine Border Patrol Sector. Chief Patrol Agent [redacted] reported for duty in October of 2007.

Relevant Regulations

5 C.F.R. Sec. 550.151 authorizes agencies to pay AUO annually "to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty."

5 C.F.R. Sec. 550.153(a) provides, in pertinent part, that for AUO to be authorized, the "position must be one in which the hours of duty cannot be controlled administratively. . .[The employee's] hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required."

5 C.F.R. Sec. 550.153(c) further provides that:

The words in Sec. 550.151 that an employee is generally "responsible for recognizing, without supervision, circumstances which require him to remain on duty" mean:

(1) The responsibility for an employee remaining on duty when required by circumstances must be a definite, official, and special requirement of his position.
(2) The employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.
(3) The requirement that the employee is responsible for recognizing circumstances does not include such clear-cut instances as, for example, when an employee must continue working because a relief fails to report as scheduled.

Relevant Policies

As noted above, the current CBP workforce has continued to reference guidance and policies from the previous agencies who administered AUO (Immigration and Naturalization Service – INS and U.S. Customs Service – USCS). Throughout this report, reference will be made to both the INS and UCSS policies and guidelines. As this report makes eminently clear, the existence of multiple instructions and the lack of one central AUO policy for CBP have contributed to the problems with documentation and monitoring of AUO administration. The general guidance on the use of AUO issued by legacy Customs and INS is consistent with the law on AUO. Clearly, however, with the creation of DHS, there has been some warranted misunderstandings as to which forms are still in effect to document AUO availability. Witness statements confirmed this confusion and while not necessarily an excuse for the failure to properly document and certify AUO consistent with the law, it demonstrates a deficiency in the agency's AUO policies.

The CBP Payroll System Handbook, Chapter 8, Premium Pay, restates the requirements of the law governing the administration of AUO.

A substantial amount of irregular overtime by itself is not sufficient.

(1) The hours of duty cannot be controlled administratively. That is, the hours of duty and place of work cannot be controlled through normal administrative action such as hiring additional personnel or rescheduling hours of duty. The element of uncontrollability must be an inherent part of the assigned duties, for example, a criminal investigator whose hours of duty and place of work depend on the behavior of criminals or suspected criminals.

(2) Substantial amounts of irregular overtime are required. This means the irregular overtime is a continuing requirement usually averaging more than once a week and averaging at least 3 hours a week.

(3) The employee is generally responsible for recognizing, without supervision, when to remain on or return to duty. The responsibility to remain on duty must be an official and special requirement of the position. The requirement to remain on duty must be inherently related to the purpose of the position and of such a nature as to constitute negligence if not fulfilled.

(4) There must be a sound basis for anticipating that such requirement will be ongoing. Both the experience in the previous four (4) calendar quarters and the nature of the assigned duties must point to an ongoing need to perform substantial amounts of irregular overtime.

However, the findings in this report demonstrate that OBP personnel would not necessarily have sought the legacy Customs issuance as a source of guidance with regard to use of AUO. Accordingly, the CBP Payroll System Handbook is being referenced here purely as a legitimate and accurate source regarding the position that all of the following requirements must be met for work to be AUO qualified.

A. The payment of AUO to Senior Managers in the Blaine Sector Headquarters is inconsistent with Section 1.3.103 of the (INS) Administrative Manual: Procedures.

The Administrative Manual: Procedures provides that AUO is a premium pay, paid on an annual basis, to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty.

Under the former Immigration and Naturalization Services (INS) policy (which remains in effect, unless superseded, due to the savings provision contained in the Homeland Security Act of 2002), the Form G-1012 was the official record of AUO hours worked by every employee who earned AUO. The INS procedure required that it be signed every pay period by the employee and by the immediate or higher level supervisor. A copy of the form was to be filed for a minimum of six (6) years in the Time and Attendance Folder (T&A) of each employee on AUO, and available for review by interested parties.

AUO requires a determination be made by the immediate supervisor, or by a higher level supervisor or manager, that an employee has work assignments that frequently require unscheduled overtime work that cannot be controlled, that the AUO hours reported by the employee are actually worked, and that therefore the employee may earn a specified percentage of AUO annual premium pay. This determination is to be documented on a certification form.

The Administrative Manual: Procedures also provides examples of incorrect applications of administratively uncontrollable overtime (AUO) pay authority. Examples of potential misuses of the AUO pay authority which should be identified and corrected are the following:

(1) payment of AUO pay to an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work;

(2) crediting of hours of work for AUO pay that are clerical or administrative in nature, can be easily scheduled in advance, and do not involve independent investigative or other administratively uncontrollable work;

CBP-IA agents conducted interviews and obtained sworn statements from seven (7) Blaine Sector Headquarters senior managers. These interviews established that the AUO documented and claimed by these individuals is controllable, administrative in nature and functionally extends their daily shift by two hours each day.

The interviews of the Blaine Sector Headquarters senior managers revealed that as a general matter, they work a 0700 hours to 1500 hours shift, plus two (2) contiguous hours of AUO, each day. They consistently described AUO as any work that carries over past the end of the shift and must be completed prior to departing. At the Sector level, most of this work is administrative in nature, often consisting of Headquarters or local taskings. The senior managers do not record the actual work performed that comprises AUO on any forms in conformance with the former INS policy. Each manager referenced the use of the legacy INS Form I-50/ Form G-1012 to document such work prior to the creation of CBP. CBP (and now OBP) utilizes an electronic medium to capture overtime data, the Customs Overtime Scheduling System (COSS).

COSS Data Review of Blaine Sector Headquarters

CBP-IPD conducted a data query through COSS of the daily shift schedules of Blaine Sector Senior Managers and Intelligence Analysts for the time period November 2005 through July 2006. A review of these work schedules revealed that at the end of each employee's normal eight (8) hour work shift, an additional two (2) hours of AUO was claimed a majority of the time, giving the appearance that the two (2) hours are controllable.

NFC Data Review of Blaine Sector Headquarters

IPD also conducted a review of payroll data provided by the NFC. The overtime records show a discernable pattern that indicates the overtime claimed by employees at the Sector Headquarters was administratively controllable.
Specifically, the NFC data shows:

A review of Sector Headquarters Border Patrol Agents' time and attendance data for the period November 2005 through July 2006 shows that (2) hours of AUO was reportedly worked immediately following the assigned shift 67% of the time.

B.* The payment of AUO to *Supervisory Border Patrol Agents and Patrol Agents at the Lynden Station is inconsistent with 5 CFR Sections 550.151, 550.153.

5 CFR Sec 550.151 provides that: "An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart ....to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular of occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty."

5 CFR Sec 550.153 (c) (2) further provides that "[t]he employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence."

CBP-IA agents conducted interviews and obtained sworn statements from seven (7) Supervisory Agents, and five (5) Patrol Agents at the Lynden Station.

The investigation determined that the primary use of AUO at the Lynden Station is to provide a transition for the three (3) regularly scheduled shifts per day. Substantial amounts of overtime are worked at the Lynden Station. These hours should not have been claimed as AUO. The agents are aware of qualifying AUO duties that occur occasionally, but described the most frequent use of AUO as routine administrative duties or a continuation of patrol duties while awaiting shift relief. The two hours of AUO are worked at the conclusion of the assigned shift because it is desirable to earn AUO at the 25% rate. Few examples of returning to work after a break in the scheduled shift were documented.

1. The interviews of the Lynden Station Supervisory Agents revealed that they work an eight (8) hour shift and usually two (2) hours of AUO each day. They describe AUO as any work that is required and carried over past the end of the regular shift. Their understanding of work that qualifies as AUO includes travel time at the end of the shift needed for transitioning agents from one shift to another, vehicle and equipment check-in and maintenance, checking emails, and other administrative duties. According to law and policy, these activities are not AUO-qualifying work. However, they also understand that work that qualifies as AUO includes processing seizures and/or apprehensions that occur at the end of the shift, transporting prisoners, completing required post-seizure/arrest paperwork, and tracking or surveillance of ongoing smuggling events that occur at the end of the shift.

Supervisory patrol agents stated that they do not require patrol agents to work a ten-hour day, and all supervisors stated they follow the motto "claim what you work and work what you claim." They acknowledge that all agents are aware that to claim 25% AUO pay, an employee must work approximately two hours of AUO each day.

Supervisory patrol agents indicated that they do not record their actual AUO-qualifying work on any paper forms. They each refer to the prior use of the legacy INS Form I-50/Form G-1012 to document such work prior to the creation of CBP. CBP (and now OBP) utilizes an electronic medium to capture overtime date, the Customs Overtime Scheduling System (COSS).

2. The interviews of the Lynden Station Patrol Agents revealed that on a daily basis agents work an eight hour shift and usually two additional hours for which they claimed AUO. They appear to believe that AUO is work that is required and carried over past the end of the regular shift. Their understanding of work that qualifies as AUO includes travel time at the end of the shift needed for transitioning agents from one shift to another, vehicle and equipment check-in and maintenance, checking emails and other administrative duties. These activities are generally not considered to be AUO-qualifying work. Patrol agents consistently estimate that the time needed to transition the shift takes approximately 30 to 45 minutes. However, they also understand that work that qualifying AUO work includes processing seizures and/or apprehensions that occur at the end of the shift, transporting prisoners, completing required post-seizure/arrest paperwork, and tracking or surveillance of ongoing smuggling events that occur at the end of the shift.

The patrol agents indicated that they are not required to work a ten-hour day, and that they are able to determine what, if any, AUO hours they work, unless there is a seizure that the supervisor requires them to stay and help process. Each patrol agent understands that to claim 25% AUO pay, an employee must work approximately two hours of AUO each day. They also follow the motto "claim what you work and work what you claim."

Policy Statement, 1.3.103 Administrative Manual: Procedures refers to the published AUO Training Guide dated September 22, 1997. The training guide, prepared by legacy INS, is the principal training document relied upon by the field agents. This two part guide provides a complete discussion of the law, regulations and policies that govern the application of AUO.

Part I of the training guide states, in part, that the employees must:

> Maintain accurate and timely AUO Logs.
> Eliminate routinely working 10 or more hours every day but reporting only 10 hours.
> Keep copies of AUO logs submitted to supervisor and timekeeper.

The Office of Personnel Management (OPM) further qualifies that:

> The additional work is not due to a delay or absence of a relief shift.

Patrol agents indicated that they do not record their actual AUO-qualifying work on any paper forms. They each refer to the prior use of the legacy INS Form I-50/Form G-1012 to document such work prior to the establishment of CBP in March 2003. However, since the creation of CBP and the application of the electronic format, through COSS, the use of the paper forms has ceased.

CBP-IA agents obtained and reviewed Form G-481 Daily Unit Assignment Logs and Form G-259a Duty Assignment Sheets for the time period October 1, 2005, through May 10, 2008, for the Blaine Sector Headquarters and the Lynden Station.

A review of the Form G-259a's from the Lynden Station shows that the agents are scheduled for an eight hour shift, and there is a blank square for the assumed two hours of AUO. Supervisory Patrol Agents advised that they make a handwritten notation in this blank square when a Patrol Agent works anything other than the two hours of AUO, such as no AUO or one (1) hour of AUO. A total of approximately one hundred and forty seven (147) handwritten changes were made to the individual patrol agents' schedules, which document AUO worked that differed with the regular eight hour shift plus the assumed two hours of AUO. This supports the testimony provided by the supervisory patrol agents at the Lynden Station.

3. A review of the Form G-259a's from the Blaine Sector Headquarters shows that the senior managers are scheduled for an eight hour shift, mostly from 0700 hours to 1500 hours, with a blank space for the days they work. There are no changes made to reflect the AUO hours worked from the original schedule of the senior managers, as is the case at the Lynden Station. This practice gives the appearance of scheduled ten (10) hour days.

According to the information obtained during the interviews of the senior managers, actual hours which meet the requirements for AUO such as after-hours calls, call-outs, and work performed in the evening after returning home are not documented or claimed due to the belief that these hours are in excess of the threshold required to maintain the current AUO rate. They have already worked and claimed the maximum hours necessary.

COSS Data Review of Lynden Station

CBP-IPD conducted a data query through COSS of the daily shift schedules of the Lynden Border Patrol Station Supervisory Patrol Agents and Patrol Agents for the time period November 2005 through July 2006. A review of these work schedules revealed that at the end of each employee's normal eight (8) hour work shift, an additional two (2) hours of AUO was claimed a majority of the time, giving the appearance that the two (2) hours are controllable.

NFC Data Review of Lynden Station

IPD also conducted a review of payroll data provided by the National Finance Center. The overtime records indicate a discernable pattern that indicates the overtime claimed by the Lynden Station was administratively controllable.

Specifically the NFC data shows:

A sample of Lynden Border Patrol agents' time and attendance data for the period November 2005 through July 2006 shows that 97% of the time two (2) hours of AUO was reportedly worked immediately following the assigned shift.

A sample of the Lynden Border Patrol Supervisors time and attendance data for the period November 2005 through July 2006 shows that 88% of the time two (2) hours of AUO was reportedly worked immediately following the assigned shift.

Issues

Issue 1: Documentation

The investigation revealed deficiencies in the Blaine Sector Border Patrol's controls over the authorization of AUO. There is insufficient written documentation available to enable an independent outside reviewer to determine whether an employee is entitled to the rate of administratively uncontrollable overtime (AUO) pay he or she receives.

> (a) Policy Statement, Section 1.3.103 of the (INS) Administrative Manual: Procedures mandates the use of a certification process for the payment of AUO. Border Patrol agents and Supervisory Border Patrol agents are AUO eligible positions; newly created positions require approval to become eligible. A certification by the supervisor must be made for each employee occupying an eligible position to earn AUO. The certification process requires the completion of a full computation period to determine the eligibility and the rate of AUO pay for each employee. The computation period is twelve (12) pay periods and the eligibility period is four (4) pay periods. The signed certificate should be retained for six (6) years. The supervisor makes a determination that an employee has work assignments that frequently require unscheduled overtime work that cannot be controlled, that the AUO hours reported by the employee are actually worked, and that therefore the employee may earn a specified percentage of AUO annual premium pay. If there is no basis for anticipating that an employee's irregular, unscheduled overtime work will continue during an eligibility period, the employee may not be certified eligible for AUO pay.

This investigation revealed that the certification process as described above is not fully utilized to determine AUO eligibility.

> (b) The Record of AUO Hours Worked (Form I-50/G-1012) is the official paper record for Border Patrol agents of AUO hours worked. Policy Statement, Section 1.3.103 of the (INS) Administrative Manual: Procedures mandates the use of Form G-1012, Record of AUO Hours Worked. It is signed every pay period by the employee and by the immediate or higher level supervisor. The Record of AUO hours worked describes the overtime duties performed in support of AUO hours. The local records maintained do not contain an adequate description of overtime duties performed to determine if they meet AUO criteria. Therefore, a determination as to the eligibility to earn AUO and the appropriate percentage of AUO to authorize cannot be accurately made.

There are no paper forms currently in use by Blaine Sector and Lynden Station Border Patrol personnel which describe the actual type of work completed during the AUO hours. According to statements made by the interviewed personnel, prior to the creation of CBP they documented the type of work completed on a Form I-50 / Form G-1012. The closest paper equivalent to this process currently in use is the local time and attendance Excel worksheet in use by agents to document their hours. The worksheet incorporates some elements of the G-1012. There is a space for the regular eight (8) hour shift and a space on the spreadsheet for the two (2) hours of AUO, both of which are pre-formatted on the screen. For each of these areas, there is a drop-down menu in which the agents can choose the type of work done, such as Range, Air Operations, Patrol, etc. The default for this is Patrol, which the agents use unless they are at Range or in Training, which automatically fills in the AUO line as "AUO Excludable."

We note, as guidance only, that Chapter 8 of the CBP Payroll System Handbook, CIS HB 5300-09, published in June 1993, by the former U.S. Customs Service specifically requires "AUO employees to complete the CF 203 in enough detail to note the number of hours worked and the tasks performed that meet the requirements for coverage as AUO hours".

Further, Customs Directive No. 51550-004A, dated June 29, 2000, requires Customs employees earning AUO to submit monthly AUO sheets (CF203) which document in sufficient detail the non-routine, irregular overtime work performed in order to justify supervisory approval and establish a basis for oversight review and audit.

The Form G-1012 serves the same purpose for OBP. Based upon the witness testimony and the documentary evidence, the investigation revealed that the Blaine Border Patrol Sector does not currently use the Form G-1012 and did not use the Form G-1012 during the period of October 31, 2005, through June 2006, the period specifically cited in the whistleblower allegations. Supervisory Border Patrol agents rely on time and attendance data to determine the rate of AUO pay. The type of work performed is not evaluated for the purpose of establishing AUO eligibility on the Form G-1012.

Issue 2: Management Certification of AUO and Rate Determination

The number of AUO hours are tracked on a time and attendance worksheet, entered into COSS by the OBP agent and approved by a supervisor. The Lynden Station maintains a worksheet to track the AUO and the excludable hours claimed by computation period to determine the percentage of AUO each agent is eligible to earn. The Lynden Station produced completed, but unsigned certification memoranda for two (2) agents, and recalled completing approximately five (5) certifications since 2004. Approximately sixty (60) BP agents were assigned to the Lynden Station. The mechanics of this process simply insure an appropriate number of hours are claimed and entered to earn AUO at the 25% rate. Neither the regularity and consistent pattern of the work claimed, nor the duties performed are evaluated in the Lynden Station certification process. As stated in the Payroll Handbook, all four requirements must be met to authorize AUO. A substantial amount of irregular overtime by itself is not sufficient.

The INS training guide is the principal training document currently relied upon in the field by OBP. Policy Statement, Section 1.3.103 of the Procedures Manual specifically makes reference to the published AUO Training Guide dated September 22, 1997. This two-part guide provides a complete discussion of the law, regulations and policies that govern the application of AUO.

Part II of the Administratively Uncontrollable Overtime Training Manual states in part:

The INS AUO policy also requires that:

- *The original certification is to be filed in the Official Personnel File*
- *A copy of the certification form is filed by the Administrative Officer in the District Office, or in Border Patrol Sectors, by the employee serving in that capacity.*
- *The certification form must be replaced with a new certification at the beginning of each fiscal year.*

Previous warnings Regarding Proper Use of AUO

On January 14, 2008, the Chief, Office of Border Patrol, issued a memorandum to All Sector Chief Patrol Agents on the use of Administratively AUO at checkpoints. This document states that "[t]he AUO policy and prior reviews of AUO premium pay clearly indicate that AUO premium pay is NOT appropriate for compensating employees for covering shift changes. Managers should adjust the shift scheduling by administrative means such as overlapping shifts, four-shift rotations, or other arrangements to eliminate the need to cover shift changes with overtime work and thus better manage regularly scheduled overtime and its costs."

This memorandum also provides the four (4) criteria for justifying approval of AUO premium pay as found in the Customs Payroll Handbook. These requirements must be met for those certified AUO positions and is not limited to checkpoint operations. Criteria number three (3) concludes with the statement "However, if such continuation of infrequent work becomes more than irregular and there is a discernable pattern of

work assignments then the Sector Chief Patrol Agent should review the hours to determine if they are administratively controllable by scheduling."

The memorandum states "In order to insure that our employees are properly compensated for performing the work of the Border Patrol while accurately monitoring costs and minimizing questions about premium and overtime pay, Sector Chief Patrol Agents are directed to immediately review the method of compensation used for payment for work in excess of eight hours in a day, particularly at checkpoints."

This investigation and review of the time and attendance files, time and attendance records from the CBP Overtime Scheduling System and NFC payroll records confirm a pattern of work assignments that are controllable by scheduling at the Blaine Sector Headquarters and the Lynden Station.

Based upon the documentary evidence and witness testimony, it is evident that the regular and consistent addition of two (2) hours of AUO to the regularly scheduled eight (8) hour day implies hours of duty are controllable by management. Based on the information collected, the use of AUO at the Lynden Station appears to be comprised of routine duties controllable by the hiring of additional personnel or rescheduling of hours of duty. A Supervisory Lynden Border Patrol Agent provided testimony that "I am aware of the memorandum that came out earlier this year regarding AUO at checkpoints. This has been discussed at the station level for possible application with tactical checkpoints here in the Lynden area of responsibility. As I understand it, they are using four (4) shifts at some checkpoints so that the drive to and from the checkpoint is covered by the first and last hour of the shift. If we had sufficient manpower, this could be a possible solution to the drive to and from patrol zones during an agent's scheduled shift."

OBP, Blaine Sector was the subject of a previous investigation involving overtime abuse including the allegation of improper payment of AUO. In June of 2007 investigation OSC DI-07-0929 determined OBP managers at the Blaine Sector could not justify the payment of AUO to SBPA [redacted]. In part, the investigation revealed that SBPA [redacted] routinely worked two additional hours at the end of his shift each day. At times, he responded to telephone calls at home, which he counted towards his AUO. These calls included employee requests for leave, calls from employees making complaints, calls from agents asking him to sign A-files, and calls from Radio Communications Center personnel requesting permission to contact Canadian law enforcement about an armed subject approaching the border. Based upon the assessment provided by CBP HRM, SBPA [redacted] regular and consistent overtime records were an indicator that his overtime was administratively controllable. This finding was notice that AUO compensation practices were problematic.

5. DESCRIPTION OF ACTION TAKEN OR PLANNED

A. ACTION TAKEN

Reminder notice issued to field concerning proper use and documentation of AUO to clarify that the memorandum issued to all Sector Chief Patrol Agents by OBP Chief David Aguilar dated January 14, 2008, is not limited to Checkpoints.

Unified CBP policy on AUO administration has been approved by CBP leadership. The policy directive outlines guidance on the proper application of AUO and provides administrative processes (including appropriate electronic forms) to be used by CBP employees in requesting and approving AUO payments. Implementation process for the policy is outlined below.

Training modules for supervisors have been developed.

A draft "user's guide" tool for employees who earn AUO has been developed.

B. ACTION PLANNED

CBP has been working to create and coordinate the implementation of an Agency-wide AUO policy directive that will bring conformity to the policies and practices regarding this premium payment. Since the CBP's creation in 2003, two different Agency policies have been in force and the resulting confusion has diminished the quality and integrity of our AUO administration. Now that CBP's leadership has approved the new CBP AUO policy, the agency is obligated to meet its statutory labor obligations. As a result, our next step will be to issue notice to the two unions representing CBP employees impacted by the AUO policy. This notice will provide the unions with the new policy on AUO administration and will provide each union with the opportunity to bargain on those issues which are deemed negotiable.

At the conclusion of bargaining with both unions, the AUO policy will be implemented throughout the Agency. It should be noted that the approach taken to educating employees on the AUO policy and procedures is a negotiable issue and therefore, the negotiations with the unions will likely impact the Agency's roll out plan for training. However, the Agency has a comprehensive roll-out of guidance and education to include on site training as well as a web based learning center, some of which is directed at the supervisory and managerial workforce and we will begin that education process while the union negotiations are proceeding.

Further, all members of the Blaine management team will be counseled regarding the documentation deficiencies that they did not detect or correct while approving AUO payments for staff. Additionally, the counseling shall include specific guidance regarding when AUO is appropriate and when other overtime payments should be approved to address the need for overtime as it arises in the Sector.

Finally, the Agency has considered the feasibility of recouping the AUO dollars spent for what should have been properly paid as FEPA overtime. Based on our cost analysis of the two pay systems, the difference in payout between the FEPA overtime and AUO is insignificant and would not warrant an adjustment. Indeed, the Agency would bear the additional cost to process the change in pay from AUO to FEPA overtime or the cost of processing a waiver.