

Mr Edward F. Flood  
Office of Special Counsel  
1730 M Street, N.W., Suite 218  
Washington DC, 20036

October 13, 2008

Dear Mr. Flood,

I received the report (OSC File No. DI-080663), on October 6<sup>th</sup>, 2008. I have since reviewed the report and am generally pleased that my conclusions were validated by the investigation. However, the investigation failed to identify a cause of the abuse, or the root of this very wide spread problem. In a time of fiscal limitations in our government, I think this should be a question of primary concern.

I am obviously aware of AUO in a much different way today than in the past. There are several recent events that I have witnessed that indicate the continuation of "maximizing AUO" every day or pay period, regardless of an appropriate workload requirement. I am also attaching an excerpt to this letter, which I printed from the OBP website regarding AUO and the "overall compensation package" for Border Patrol Agents. It seems rather clear to me that senior Border Patrol managers have no intention of actually limiting or properly tracking AUO because to do so would result in a decrease in annual income for Border Patrol agents, including themselves.

I printed the attached article this morning, however it was posted several months ago. I was surprised to see that the uppermost levels of Border Patrol Management support AUO as an entitlement (in concept) rather than an overtime provision as it was intended, and would otherwise be consistent with the law. The article states that "**OBP views AUO as a key part of the overall compensation package for BPAs,**". If this is true, then there is little incentive for middle or lower level managers or supervisors to actually monitor and restrict the use of AUO only for the limited purpose allowed by law. Rather, the Agency posture seems to be to continue with business as usual until the Journeyman Agent grade can be increased, and a special rate of LEAP pay can be approved. Why should these government employees be rewarded financially for misusing the AUO pay provision?

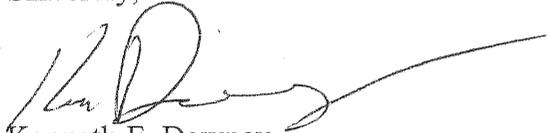
I am aware of one case recently where two Non-Agent employees were issued adverse action proposals, including removal proceedings, because some very minor pay accounting irregularities were noted. In that case the employee in question was paid the correct pay amount, but the schedule data recorded did not accurately reflect the hours the employee worked. If such a minor error can result in a removal proceeding, why is the Agency so reluctant to address this rampant AUO abuse among Border Patrol Agents? If each Agent is paid at the GS-11 step 1 level, the annual AUO bonus is equal to around \$14,250 each. And then, because they are generally out of AUO hours when OT is needed, they get additional pay at the FLSA rate. Many Agents cap out their legal pay amount on an annual basis at 30% above the base pay. That's a lot of overtime without accurate controls or accountability.

In addition to the web site article, Chief Patrol Agent John Bates stated in a recent staff meeting retreat here in Blaine that he had allowed Agents to use AUO hours to participate in the health improvement program (HIP) while he was Chief in Detroit. He stated that he realized this was not consistent with Agency policy, but allowed it anyway. HIP is a program where employees may, while on duty, use the gym for exercise. Since that meeting I have observed Staff Agents working out during hours that were likely claimed as AUO, between 15:00 and 17:00. I discussed this with the Assistant Chief over our program, Ramon Nunez, and he concurred that this was not permitted by regulation, and admitted that he was aware of the practice. My observations occurred after the Internal Affairs investigators did their work here in Blaine collecting documents. The Sector Staff is clearly aware of this investigation, but haven't changed their behavior in any noticeable way.

Most recently, while reviewing some recorded radio and telephone traffic for ACPA Vanderheyden, I heard a Patrol Agent from Port Angeles Station providing shift schedule information to one of my staff on October 8<sup>th</sup>. The Agent stated that certain agents were going home at that time, others would be on until the shift was over at 05:00 plus AUO. This was at 03:45. How could this agent have known that there was an AUO need more than one hour in the future for a different Agent? The answer is that they, like every other Border Patrol Agent, work the extra two hours simply to earn AUO at the 25% pay bonus.

As I read through section 5, Description of Actions Taken or Planned, of the report it felt a bit like kissing my sister. Sure, the report validated my observations but it will not have any effect on a day to day basis, nor prevent any abuse from continuing. If the Agency has proven time and again that proper management of AUO is not possible, then why not simply eliminate the provision? If FEPA (45Act Overtime) and AUO pay is so similar, there shouldn't be any "loss of pay" if the work being performed each day actually needs to be accomplished. The tracking process for FEPA overtime is well established, it's ordered and approved in advance by management, not left to the discretion of the individual employee. If the rest of the government can operate this way, surely the Border Patrol can as well. Granting Border Patrol Agents a 33% LEAP increase as indicated in the web article seems like a reward for mis-managing an existing pay provision, not a corrective measure.

Sincerely,



Kenneth E. Downey  
Supervisory Sector Enforcement Specialist  
Blaine Sector, USBP

**Rumor: Journeyman Border Patrol agents (BPAs) will be upgraded to GS-12 with LEAP.**

**Fact:** The Office of Border Patrol (OBP) believes that as the duties of Border Patrol agents have grown in the past few years, it is appropriate to consider raising the journeyman grade from GS-11 to GS-12. OBP is looking at several options that would allow us to phase-in this upgrade. In order to make the change, OBP will have to submit a request for a budget increase. Gaining approval for budget increases is a long, time-consuming process, but OBP is doing its best to go forward as quickly as possible.

The question of the journeyman grade level can be considered in parallel with a broader review of the BPA compensation structure. OBP is reviewing the BPA compensation package, to include the Administratively Uncontrollable Overtime (AUO) and Fair Labor Standards Act (FLSA) elements. OBP views AUO as a key part of the overall compensation package for BPAs, but it is becoming increasingly difficult to consistently manage in our rapidly changing environment. AUO has several gray areas, which leave us, as an agency, vulnerable to frequent challenges and lawsuits over the use of AUO. In turn, this creates a sense of uncertainty and confusion that compromises our ability to perform our mission.

The intention of OBP is to maintain AUO. However, that assumes that clarity and consistency in how AUO is applied and managed can be achieved. If OBP finds that a clear and consistent application and management of AUO cannot be reasonably achieved, OBP will look at other options, including the use of Law Enforcement Availability Pay (LEAP) instead of AUO. Since LEAP does not provide for FLSA, OBP is concerned that many agents would see their compensation reduced by moving from AUO to LEAP without some other adjustment. One possible alternative would be implementing LEAP simultaneously with an increase in the journeyman grade to GS-12. Another option would be increasing the LEAP percentage from 25% to 33% at the GS-11 grade.

None of these options are quick, or easy to implement, and many require congressional authorization. OBP's goal, in any case, will be the enhancement of our ability to perform our mission, while ensuring that we retain, or increase, the compensation and benefits provided to agents.