

NOV 07 2014



U.S. Customs and
Border Protection

Carolyn N. Lerner
Special Counsel
Office of Special Counsel
1730 M Street, Suite 300
Washington, D.C. 20036-4505

Commissioner

Re: OSC File No. DI-14-1093

Dear Ms. Lerner:

The enclosed report is in response to your referral of allegations that employees assigned to the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), U.S. Border Patrol (USBP) Headquarters in Washington, D.C. engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. The Office of Special Counsel (OSC) received the allegations from whistleblowers who alleged that employees in the USBP Headquarters claim administratively uncontrollable overtime (AUO) daily, but fail to perform duties that qualify for AUO. I am the designated official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213.

On January 24, 2014, OSC referred the above allegations and a request for an investigation to DHS Acting Secretary Jeh Johnson. DHS requested the assistant of the DHS Office of Inspector General (OIG) to investigate the allegations. The investigation was completed on September 15, 2014 and found that USBP's documentation was inadequate to determine if AUO qualifying duties were being performed. The OIG reported that while a few agents did describe work that likely qualified for AUO, some of the work and tasks that were recorded and documented on G-1012 forms appeared to be regular, predictable, and administrative in nature. Many of the employees the OIG interviewed stated that they did not receive consistent training or guidance on what work qualifies as AUO and they did not follow or understand how to document and record AUO-qualifying work. Several agents stated, and that they did, at times, claim AUO to complete administrative tasks such as preparing briefings, paperwork or to finish meetings that ran long. The OIG pointed out that some agents had a misconception of AUO, and thought it was for all unscheduled and irregular work, or that AUO compensation was for any time worked beyond the regular 8-hour shift.

The findings are included in the enclosed report. Although the OIG's report does include an "Actions Taken and Planned Section," I am enclosing a more detailed description of CBP's plan to address the abuse and misuse of AUO. Of particular note, on September 7, 2014, CBP de-authorized AUO for USBP Headquarters positions. This action was taken in accordance with the Office of Human Resources Management's determination that these positions did not meet the qualifying requirements for AUO. Additionally, many of

the actions described in the enclosure have already been implemented in response to other allegations and findings of AUO abuse and misuse. Furthermore, I am working directly with USBP and other program offices to develop and implement plans to ensure future compliance with the rules governing AUO.

If you require further information regarding this matter, please contact Philip Carpio in the Office of Chief Counsel at 202-344-2940.

Sincerely,



R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Enclosures

cc: Secretary, Department of Homeland Security
Deputy Secretary, Department of Homeland Security
Chief Human Capital Officer, Department of Homeland Security
General Counsel, Department of Homeland Security

**DHS OIG – Evaluation of Alleged AUO Misuse at U.S. Border Patrol Headquarters
(OSC File No. DI-14-1093)
Plan for Corrective Action**

AUO Position Eligibility Review

Recognizing long-term challenges in the administration and application of AUO, in April 2013, CBP began a comprehensive internal review of the 153 positions designated as eligible for AUO compensation. The objectives of the review were to: validate the continued eligibility of each CBP position designated as AUO eligible, identify positions that do not meet the criteria for AUO compensation, and determine any necessary corrective actions.

While the results indicated that most employees within CBP that were eligible for AUO should remain eligible for continued compensation under AUO, it also identified positions which should not be authorized to earn AUO based on their duties and job functions. As a result, CBP has de-authorized AUO for those employees determined not eligible for AUO. This includes employees at Border Patrol headquarters.

Moving forward, CBP will continue to use the appropriate mechanisms to compensate the impacted employees for work performed under other forms of overtime or premium pay as appropriate under applicable law. Employees who are not exempt from the Fair Labor Standards Act (FLSA) will be paid at FLSA rates for any overtime worked, which in some cases may result in a higher compensation rate than is currently paid under AUO. Those employees who are exempt from FLSA will earn overtime pursuant to the Federal Employee Pay Act instead, but only for overtime which is officially ordered and approved in advance.

In addition to the corrective actions to de-authorize AUO for positions not meeting the legal eligibility criteria, CBP will continue to assist employees by providing resources and information concerning compensation. Improved educational resources will also be provided for supervisors and timekeepers concerning overtime compensation to include AUO eligibility criteria, applicable overtime rules and procedures, and their respective responsibilities.

CBP will conduct regular position reviews to confirm continued eligibility for AUO. This includes reviewing each position every three years.

In addition, CBP will institute processes to identify and suspend AUO for employees temporarily detailed to non-AUO duties, including those detailed to headquarters positions.

New CBP AUO Directive

CBP employees covered by or managing AUO currently follow policies and guidance that, while legally compliant, are not consistent across the agency. Among other things, existing policies require regular reviews of position eligibility, annual recertification, and reporting. CBP has developed a new comprehensive CBP AUO Directive to replace the existing fragmented policies and procedural guidelines currently in existence. The new Directive will govern CBP's policies

and practices with respect to AUO. It will define roles and responsibilities and will help ensure that CBP's AUO practices and policies are legally compliant and consistent.

The new CBP AUO Directive will also include a new form for reporting AUO-compensable hours to ensure both that hours claimed are eligible for AUO and for determining the appropriate rate of AUO. The form will require detailed descriptions of the work performed. The new record-keeping requirements will enable managers to more effectively evaluate hours claimed and determine the appropriate form of overtime payment, ensuring that employees are compensated appropriately for the work performed. These changes will also support better tracking and monitoring of AUO use and management of overtime expenditures.

To ensure consistency with the guidance from the Department, CBP will proceed with finalizing the CBP AUO Directive once the DHS Directive is completed and issued.

Training

In May 2014, CBP began rolling out mandatory overtime training for managers and supervisors impacted by the AUO position review. The training is designed to instruct managers about what is legally permissible in accordance with the statutes and regulations and in accordance with established policy. The overtime training is comprehensive and not only covers AUO, but provides instruction and guidance on overtime compensation under the Fair Labor Standards Act (FLSA), the Federal Employees Pay Act (FEPA), the Customs Overtime Pay Reform Act (COPRA), and the Law Enforcement Availability Pay (LEAP).

Accountability

CBP will review its AUO and overtime management and reporting processes along with internal controls to ensure compliance. CBP's internal control measures include regular certifications, reviews, inclusion in CBP's self-inspection program, reviews by CBP's Management Inspections Division, ongoing reporting and reviews of those reports.

The Office of Border Patrol (OBP) is implementing changes to its overtime reporting process. It has initiated mandatory use of location codes in the CBP Overtime Scheduling System and supervisors are required to verify employee assignments, schedule, and hours of work using the Border Patrol Enforcement Tracking System. These initiatives will better enable supervisors to properly categorize areas of work. OBP is also instituting procedures to ensure supervisors and managers properly review each employee's AUO hours claimed and that the documentation in scheduling and pay systems articulate the type of work performed.

Legislation

The Border Patrol Agent Pay Reform Act (BPAPRA) is currently before Congress. The proposed legislation would provide a new statute that would create a three step pay system for scheduled overtime. This statutory pay scheme, along with its implementing regulations, would alleviate the confusion concerning former overtime pay compensation policies and procedures.

Department of Homeland Security Office of Inspector General

**Evaluation of Alleged AUO Misuse at
U.S. Border Patrol Headquarters
(OSC File No. DI-14-1093)**





OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

September 15, 2014

MEMORANDUM FOR: The Honorable Stevan E. Bunnell
General Counsel
Department of Homeland Security

FROM: John Roth *John Roth*
Inspector General

SUBJECT: *Evaluation of Alleged AUO Misuse at U.S. Border Patrol
Headquarters (OSC File No. DI-14-1093)*

The U.S. Office of Special Counsel (OSC) received a whistleblower disclosure concerning U.S. Customs and Border Protection's (CBP) U.S. Border Patrol Headquarters in Washington, DC. The whistleblower alleged that employees in U.S. Border Patrol (USBP) Headquarters claim administratively uncontrollable overtime (AUO) daily, but fail to perform duties that qualify for AUO.

On January 24, 2014, OSC referred this allegation to DHS Secretary Jeh Johnson. The Department subsequently requested our assistance with this allegation and several other AUO-related allegations from other DHS components. We assembled a taskforce of auditors, program analysts, investigators, and attorneys to review these allegations. Given time constraints and limited resources, we determined that a limited-scope review of the components' use of AUO in 2013 and 2014 would yield the most useful results.

The attached final report contains the results of our evaluation on the alleged misuse of AUO at USBP Headquarters. Your office provided technical comments on an earlier version of this report, which we incorporated in this report as appropriate. We intend to publish this report on our website within 90 days of the date of this memorandum. We will issue the results of our evaluations of the alleged misuse of AUO at other components in separate reports.

Please call me with any questions, or your staff may contact John E. McCoy II, Deputy Assistant Inspector General for Audits, at (202) 254-4100.

Attachment



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Summary of Results

USBP Headquarters did not have sufficient AUO documentation to allow us to specifically identify a violation of law, rule, or regulation. However, many of the tasks that agents performed during AUO hours appear to have been administratively controllable.

Background

An anonymous whistleblower alleged that USBP agents assigned to headquarters “illegally claim” AUO daily but do not perform duties justifying their AUO claims. Further, the whistleblower asserted that, “the duties and responsibilities of Border Patrol headquarters employees are regular, predictable, and controllable and that headquarters work is not sufficiently urgent to warrant the use of AUO.”

According to the whistleblower, in 2008, CBP pledged to issue a component-wide directive on the proper use of AUO and conduct annual AUO training for all employees because of acknowledged AUO abuse by border patrol agents in Lynden Station, Washington.

OSC concluded, “there is a substantial likelihood that the information the whistleblower provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority.”

As of August 9, 2014, USBP Headquarters employed 220 Border Patrol agents in three divisions—Mission Support (26 agents); Operations (118 agents); and Strategic Planning, Policy & Analysis (52 agents); as well as the Office of the Chief of Staff (10 agents) and the External Assignment Unit (14 agents).¹ The Mission Support Division provides enterprise-wide oversight of USBP finance, logistics, and human resource and workforce management programs. The Operations division facilitates the security of our Nation’s borders by providing direction and support to USBP sectors nationwide. The Strategic Planning, Policy & Analysis division develops policies and standard operating procedures; conducts strategic planning; formulates budgets; develops performance measures; and reviews statistical data. According to data provided by CBP, 238 USBP Headquarters agents received approximately \$4.5 million in AUO pay in FY 2013.

In January 2014, DHS Secretary Johnson issued a memorandum suspending the use and payment of AUO for all DHS headquarters employees. Accordingly, USBP Headquarters

¹ Only Border Patrol agents (job series 1896) assigned to USBP Headquarters are included; USBP Headquarters also employs staff in other job series that have never been eligible for AUO.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

suspended AUO as of January 26, 2014 (pay period 02).² USBP Headquarters informed its agents that any overtime hours worked after that date would be “paid under the Federal Labor Standards Act (FLSA) or the Federal Employees Pay Act (FEPA).”

Relevant Regulations

According to 5 Code of Federal Regulations (CFR) § 550.151, agencies are authorized to pay AUO annually “... to an employee in a position 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.”

Per 5 CFR § 550.153(a), a typical example of a position meeting the AUO requirement “... is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it.”

Further, 5 CFR § 550.153(c) defines what it means in § 550.151 that an employee is “generally responsible for recognizing, without supervision, circumstances which require him to remain on duty:

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

Section 1.3.103 of the Immigration and Naturalization Service (INS) Administrative Manual of January 2000 contains examples of situations that support the payment of AUO, instructions on certifying the percentage of AUO to be paid, and standards for documenting the overtime worked by USBP employees, including those who work at Headquarters.

² According to CBP, 17 Border Patrol agents assigned to remote or foreign locations continue to receive AUO under a waiver.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

According to INS Administrative Manual, Section 1.3.103:

- The AUO percentage rate authorized may be 10, 15, 20, or 25 percent of the employee's rate of basic pay which does not exceed the minimum rate for grade GS-10 as indicated below:
 - A position which requires an average of at least 3 but not more than 5 hours a week of irregular or occasional overtime work—10 percent.
 - A position which requires an average of over 5 but not more than 7 hours a week of irregular or occasional overtime work—15 percent.
 - A position which requires an average of over 7 but not more than 9 hours week of irregular or occasional overtime work—20 percent.
 - A position that requires an average of over 9 hours a week of irregular or occasional overtime work—25 percent.
- The weekly average of AUO hours is based upon the number of AUO hours worked by each employee during a "computation period," which is a span of time covering 12 pay periods.

The CBP Overtime Scheduling System (COSS) is used to record the number of AUO hours agents work each pay period. According to USBP guidance, employees are to use G-1012 forms to record and describe the tasks they perform during AUO duty hours; supervisors are to ensure that employees are performing AUO eligible work by reviewing the G-1012 forms every pay period. (Appendix A contains the G-1012 template.)

Finding

USBP Headquarters did not have sufficient AUO documentation to allow us to specifically identify a violation of law, rule, or regulation. Based on our review of AUO documentation and employee interviews, many of the tasks performed during AUO hours appear to have been "regular, predictable, and controllable," as alleged by the whistleblower. In our opinion, hours spent on predictable tasks should be administratively controllable.

Summary of Evidence Obtained

AUO Documentation

None of the 86 AUO documentation forms (G-1012 forms) we obtained from USBP Headquarters contained enough detail for an independent reviewer to determine whether there were compelling reasons for AUO. In addition, some tasks appeared to be regular,



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

predictable, and administrative in nature.

According to 5 CFR § 550.153(c), 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.” As shown in table 1, the G-1012 forms we reviewed often contained vague descriptions of tasks performed during AUO hours, such as “analysis” or “continuation of duties.” Based on these vague descriptions, an independent reviewer could not determine whether the agent would have been negligent if he or she had not stayed beyond regular duty hours to complete the task.

In addition, some tasks recorded during AUO hours appear to have been regularly schedulable. For example, according to the descriptions, some agents used AUO hours to complete time and attendance records (described as “COSS” and “T&A”), annual activity reports, spending plans, and performance appraisals. We believe predictable tasks such as these can be controlled through normal administrative means such as planning, delegating authority, rearranging schedules, and establishing additional shifts.

Examples of AUO Tasks Recorded on G-1012 Forms in 2013 (Facsimiles)

- Continuation of duties
- Field Support (phone/email)
- Support of Pacific Corridor Operations
- AMOSS Surveillance/ Liaison OPS
- Protocols
- Analysis
- Processing cases
- Liaison
- "Strategic" estimate/ supervisory duties
- Dissemination of information to the field
- Performance Appraisal Report editing
- Range Clean up - Weapon Maintenance
- Mapping coordinates
- COSS-T&A, JPATT
- SIP for floor safe
- Skymaster-inventory
- Weekly-week ahead
- Document Review
- Oceanus-coastal quarterly
- Budget/quarterly spend plan
- AMOC Annual Activity Reports
- Equipment purchase research
- Training Module Creation
- 5-year staffing plan, relocation funding
- CBP transportation reduction
- PPT revise and send
- Pay reform-union issues
- Classified intel



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

We did not find a pattern in the number of AUO hours headquarters agents recorded each day. Although 2 hours of AUO was recorded most frequently in COSS (33 percent), the number of hours recorded on sequential days during the pay period generally varied. Appendix B shows the percentage of time recorded for each potential AUO increment (e.g., 1 hour, 1.5 hours, and 2 hours) in COSS.

Employee Interviews

As of March 28, 2014, USBP Headquarters employed 41 supervisory agents and 171 nonsupervisory agents. In April 2014, we interviewed 10 supervisory agents and 16 nonsupervisory agents to gain a better understanding of the tasks typically performed during AUO hours. We also asked questions to determine agents' understanding of AUO, documentation of AUO tasks, and approval of AUO hours. Based on these interviews, we concluded that agents:

- Generally did not receive consistent training or guidance on AUO requirements;
- Did not always follow the requirements for documenting and reviewing tasks performed during AUO hours; and
- Sometimes used AUO hours to complete their tasks in a timely manner.

Training and Guidance

When asked about AUO guidance, some agents said they never received any guidance or took any training; others recalled receiving a memo about AUO from Chief Fisher. (In December 2012, U.S. Border Patrol Chief Michael J. Fisher issued a memo summarizing existing guidance on the administration and management of AUO to all chief patrol agents and division chiefs.) A supervisory agent said he acquired a broad understanding of AUO from years of working at USBP and knew guidance existed, but could not recall any specific guidance. Some agents thought that AUO was simply for unscheduled and irregular work; others believed that any time worked beyond their regular 8-hour workdays was AUO.

Documenting and Reviewing AUO Hours

We asked agents to describe their process for documenting AUO prior to the suspension. Although USBP AUO policy requires that agents complete the G-1012 form at the end of each pay period and have their supervisor approve it, two agents completed G-1012 forms for their own records, but did not turn them in to their supervisors; three other agents usually did not complete G-1012 forms at all. Two



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

agents told us that although they submitted G-1012 forms, they were not sure whether their supervisors reviewed them.

One supervisory agent confirmed that he does not collect or review any of his employees' G-1012 forms. Another said neither he nor his supervisor consistently review the AUO forms. Two supervisory agents told us that although they review the forms, they trust the agents to report their activities accurately and do not attempt to verify the AUO tasks listed. Two other supervisors indicated that they properly review their employees' G-1012 forms.

Use of AUO to Complete Tasks in a Timely Manner

Although a few agents described work that may have qualified for AUO, others implied that they used AUO hours to finish tasks that they simply were not able to finish by the end of their regular 8-hour shifts. For example, agents described preparing briefings for the Secretary, responding to Congressional inquiries, preparing procurement paperwork, and waiting for responses from the field. Two agents used AUO for meetings scheduled to run longer than their normal shifts. Four agents admitted that some of the tasks they performed during AUO hours could have been scheduled in advance.

CBP Actions Resulting From Lynden Station Disclosure

According to the whistleblower, in 2008, CBP pledged to issue a component-wide directive on the proper use of AUO and conduct annual AUO training for all employees as a result of acknowledged AUO abuse by border patrol agents at the Lynden Station in Washington.

CBP's Office of Internal Affairs conducted an investigation of alleged improper use of AUO at the Lynden Border Patrol Station and issued a report on its findings to OSC on August 14, 2008.

According to the report, CBP's leadership had approved a new CBP AUO policy and planned to implement it throughout the agency at the conclusion of bargaining with CBP's unions. On December 10, 2012, U.S. Border Patrol Chief Fisher issued a memorandum that summarized and emphasized existing guidance on the administration and management of AUO. However, we did not find evidence of a "new CBP AUO policy" issued after 2008.

In its 2008 report, the Office of Internal Affairs also indicated that CBP said it had created "comprehensive roll-out guidance and education to include onsite training as well as a web based learning center..." CBP also acknowledged that negotiations with



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

the unions would affect the timing of the training. However, the report did not mention any CBP plans to conduct AUO training annually, as alleged by the whistleblower.

Actions Taken and Planned

Effective January 26, 2014, USBP headquarters' use of AUO was permanently suspended. At the time of our review, USBP Headquarters was permitting the use of other types of overtime pay for work conducted outside of agents' regular 8-hour workdays.

On August 20, 2014, CBP Commissioner R. Gil Kerlikowske sent a memorandum on "Use of Administratively Uncontrollable Overtime" to Deputy Secretary Alejandro Mayorkas. The memorandum presented CBP's Office of Human Resources Management's (HRM) Report of Review and Findings on CBP's use of AUO, which was completed in June 2014. HRM determined, "the nature of the duties and overtime work performed by just over 1,900 CBP employees in positions designated as eligible to receive AUO do not meet the qualifying requirements for AUO." This includes positions located in USBP Headquarters. According to Commissioner Kerlikowske's memorandum, "CBP is pursuing a series of actions to ensure the appropriate use and payment of AUO. These include de-authorizing AUO for those positions it has been determined that AUO is not the appropriate means of overtime compensation."



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Appendix A

CBP Form G-1012 Template

U.S. Department of Homeland Security
Customs and Border Protection

Record of AUO Hours Worked

NAME		SSN	PP#	FOR PERIOD FROM:	TO:
POSITION TITLE		% AUO 25	REGION	SECTOR/DISTRICT	STATION/DEPT/PROGRAM
Date	DAILY TOUR DUTY HRS	AUO HRS WORKED	EXCLUDABLE DAYS	REASON FOR AUO HRS WORKED OR ABSENCE	
Sunday					
Monday					
1/1					
Tuesday					
1/2					
Wednesday					
1/3					
Thursday					
1/4					
Friday					
1/5					
Saturday					
1/6					
Sunday					
1/7					
Monday					
1/8					
Tuesday					
1/9					
Wednesday					
1/10					
Thursday					
1/11					
Friday					
1/12					
Saturday					
1/13					
TOTAL					
Certified True and Correct:			Examined and Approved:		
_____			_____		
Employee Signature			Supervisor Signature		

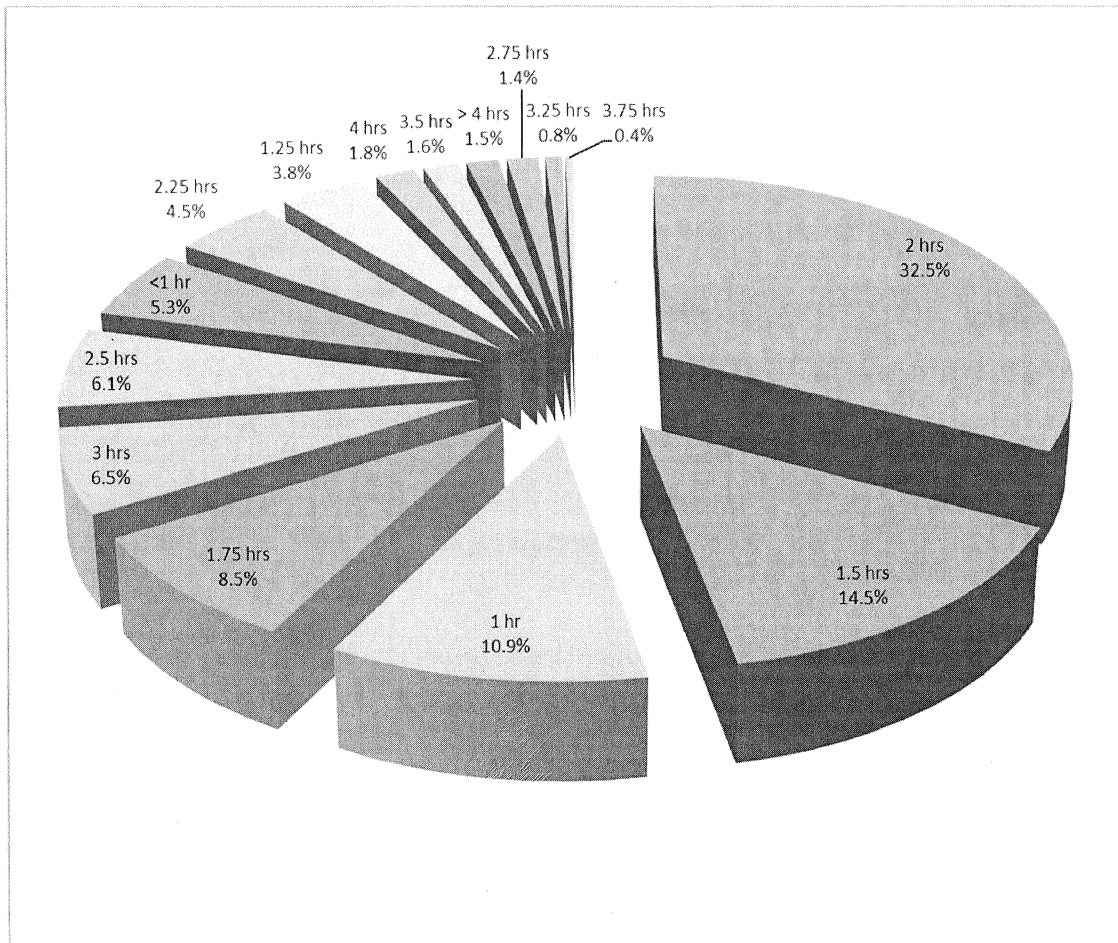
Form G-1012 (2/04/06)



Appendix B Frequency of AUO Time Increments Recorded

USBP employees record AUO hours in 15-minute increments. The chart below depicts the percentage of time each AUO increment was recorded in COSS. For example, agents recorded 2 hours of AUO about 33 percent of the time.

Increments of AUO Hours Recorded in COSS between October 2012 and February 2014



Source: DHS OIG analysis of CBP data



Appendix C Conduct of the Review

Objective and Scope: The objective of this evaluation was to assess, to the extent possible given limited resources, the validity of the whistleblower's allegation that USBP headquarters agents did not perform duties justifying their AUO claims. Our objectives included: determining the amount of AUO paid to USBP Headquarters agents, the justifications for receiving AUO pay, and whether USBP Headquarters' use of AUO was consistent with Federal regulations. The scope of this evaluation was FYs 2013 and 2014. A determination of the cause or effect of improper use of AUO was not included in the scope.

Regulations and Policies Governing AUO: We reviewed the CFR, specifically 5 CFR § 550.151 and 5 CFR § 550.153(c), as well as

- Customs Directive No. 51550-004A, Administratively Uncontrollable Overtime (AUO) Pay;
- Immigration and Naturalization Service Administrative Manual (dated January 2000);
- Chapter 8 of the Payroll System Handbook, Customs Issuance System (CIS) Handbook (HB) 5300-09; and
- December 10, 2012 memorandum from Michael J. Fisher, Chief, U.S. Border Patrol, on "Administratively Uncontrollable Overtime Guidance."

Judgmental Sample of Record of AUO Hours Worked forms (G-1012 forms): As of March 28, 2014, USBP Headquarters employed 212 agents. Of the 212 agents, 41 were supervisory and 171 were nonsupervisory.

We selected a judgmental sample of 134 G-1012 forms for 67 agents (14 supervisory and 53 nonsupervisory) who received AUO between October 1, 2012, and February 28, 2014. The sample included two random pay periods from 2013 for each agent.

Review of G-1012 Forms: We requested 134 G-1012 forms from USBP Headquarters and obtained 86. We reviewed the 86 G-1012 forms to determine the tasks agents performed while claiming AUO.

Interviews of USBP Headquarters Agents: From the list of 67 agents whose AUO forms we requested, we selected 10 supervisory agents and 16 nonsupervisory agents for interviews. We interviewed these 26 agents in April 2014 to gain a better understanding of the tasks they typically performed during AUO hours. We also asked the 26 agents questions to determine their understanding of AUO; whether they thought AUO tasks



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

could have been scheduled in advance; as well as how they tracked their AUO hours and completed G-1012 forms. We asked supervisors additional opened-ended questions to determine how they reviewed their employees' G-1012 forms, as well as how they validated the AUO hours and tasks claimed. Not every interviewee answered every question on our prepared list of questions.

Review of Payroll Records: We determined the total amount of AUO paid to USBP Headquarters agents in FY 2013.

Observation Regarding Possible Causes of Improper AUO Use: We did not design this evaluation to address the root causes of improper use of AUO. However, based on our interviews, as well as our review of congressional testimony and Federal AUO regulations, we believe there are at least three reasons Federal AUO regulations may have been improperly applied. First, employees had a sense they were entitled to AUO because it was "the way it has always been done" and AUO was part of the culture of the Border Patrol. Second, there was a lack of understanding of Federal AUO regulations, which are complex and outdated. Finally, employees maintained an attitude of doing "whatever it takes to complete the mission," without concern as to whether AUO was the correct type of premium pay for the tasks.

Evaluation Standards: We conducted this review under the authority of the *Inspector General Act of 1978*, and according to the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency, dated January 2012.

ADDITIONAL INFORMATION

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General (OIG) Office of Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov, or follow us on Twitter at: [@dhsoig](https://twitter.com/dhsoig).

OIG HOTLINE

To expedite the reporting of alleged fraud, waste, abuse or mismanagement, or any other kinds of criminal or noncriminal misconduct relative to Department of Homeland Security (DHS) programs and operations, please visit our website at www.oig.dhs.gov and click on the red tab titled "Hotline" to report. You will be directed to complete and submit an automated DHS OIG Investigative Referral Submission Form. Submission through our website ensures that your complaint will be promptly received and reviewed by DHS OIG.

Should you be unable to access our website, you may submit your complaint in writing to:

Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Office of Investigations Hotline
245 Murray Drive, SW
Washington, DC 20528-0305

You may also call 1(800) 323-8603 or fax the complaint directly to us at (202) 254-4297.

The OIG seeks to protect the identity of each writer and caller.



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

January 24, 2014

The Honorable Jeh Charles Johnson
Secretary
U.S. Department of Homeland Security
245 Murray Lane, S.W.
Building 410, Mail Stop 0525
Washington, D.C. 20528-0410

Re: OSC File Nos. DI-14-1093 and DI-14-1100

Dear Mr. Secretary:

Pursuant to my responsibilities as Special Counsel, I am referring to you two whistleblower disclosures that employees of the Department of Homeland Security (DHS) are engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. I received these allegations from federal employees concerning Customs and Border Protection, Office of Border Patrol in Washington, D.C., and Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) in Chattanooga, Tennessee. The whistleblowers have requested anonymity. I am referring these allegations to you for an investigation and a report of your findings.

These two most recent disclosures are the latest in a series of overtime abuse allegations that I have referred to DHS for an investigation and a report over the past 16 months. I have been informed that under your leadership, these matters will be reviewed and investigated in a more comprehensive and coordinated manner. I look forward to establishing a cooperative relationship with you to address these allegations and to stop the misuse of Administratively Uncontrollable Overtime (AUO).

The allegations to be investigated are as follows:

- Employees in the Office of Border Patrol headquarters claim AUO on a daily basis but fail to perform duties that qualify for AUO.
- Employees in the ERO office claim AUO but fail to work any additional hours or fail to perform duties that qualify for AUO.

The Code of Federal Regulations permits the payment of AUO “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 ...” 5 C.F.R. §

The Special Counsel

The Honorable Jeh Charles Johnson

January 24, 2014

Page 2 of 5

550.151. According to the regulations, an example of a position meeting the requirement "... is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it." 5 C.F.R. § 550.153(a). In order to be entitled to AUO, an "... 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." 5 C.F.R. § 550.153(c)(2). Unlike some other forms of overtime, AUO is also used in the calculation of employees' retirement benefits.

Abuse of Overtime - Border Patrol (DI-14-1093)

The whistleblower alleged that Border Patrol Agents assigned to headquarters illegally claim and receive AUO on a daily basis. Although these Border Patrol Agents are certified to receive AUO, they do not, according to the whistleblower, perform duties justifying their AUO claims. The whistleblower asserts that employees claim, and managers approve, AUO to enhance employee paychecks and future retirement benefits. The whistleblower asserts that the duties and responsibilities of Border Patrol headquarters employees are regular, predictable, and controllable and that headquarters work is not sufficiently urgent to warrant the use of AUO. In support of this assertion, the whistleblower notes that between fiscal year 2012 and fiscal year 2014, the Office of Border Patrol summarily reduced overtime payments to Border Patrol Agents by 9.5% for a total cost reduction of \$47.9 million. As set forth in DHS' Annual Performance Report for Fiscal Years 2012-2014, these reductions were achieved through "work scheduling alternatives." The report further states that imposition of these scheduling alternatives by field managers will not adversely impact CBP's border security mission. Based on this rationale, the whistleblower opines that if reductions of this magnitude can be accomplished administratively, simply by adjusting schedules and without affecting the CBP's mission, the duties currently being used to justify AUO cannot be so compelling that a failure to carry them out would constitute negligence. Thus, the whistleblower believes that the lack of duties necessitating AUO and the prodigious level of AUO abuse warrant immediate action to end this gross waste of taxpayer money.

The whistleblower holds Border Patrol leadership, particularly Border Patrol Chief Michael J. Fisher and Deputy Chief Ronald Vitiello, responsible for the continued abuse of AUO. According to the whistleblower, Border Patrol managers at headquarters fail to enforce work shift time limits and allow the imposition of unnecessary deadlines to fabricate a need for overtime. As has been alleged by previous whistleblowers, the current whistleblower asserts that a culture of entitlement to AUO has been ingrained in Border Patrol Agents by the unrestricted receipt of AUO by previous generations of Border Patrol Agents and the inclusion of references to AUO as a benefit in vacancy announcements and other recruitment materials. Both Chief Fisher and Deputy Chief Vitiello occupied Border Patrol management positions in 2008 when, following referral of a whistleblower disclosure to then-Secretary Janet Napolitano, the Border Patrol acknowledged AUO abuse by Border Patrol Agents in Lynden Station, Washington (OSC

The Special Counsel

The Honorable Jeh Charles Johnson
January 24, 2014
Page 3 of 5

File No. DI-08-0663). As a result of that report, the agency pledged to issue an agency-wide directive on the proper use of AUO and to conduct annual AUO training for all employees. Yet, according to the whistleblower, the unfettered and blatant abuse of AUO has continued under the management of Chief Fisher and Deputy Chief Vitiello.

Abuse of Overtime – Immigration and Customs Enforcement (DI-14-1100)

The whistleblower explained that the ICE, Enforcement and Removal Operations (ERO) office consists of one Supervisory Detention and Deportation Officer (SDDO), one Deportation Officer (DO), and three Immigration Enforcement Agents. The whistleblower alleged that Mr. John Denniston, DO, continually falsifies his time and attendance sheets by claiming he worked 1.5 to 2.5 hours of AUO daily while rarely working more than an 8-hour shift. In addition, the whistleblower disclosed that ERO employees have reported Mr. Denniston's wrongdoing to Mr. John Bobo, SDDO; nevertheless, Mr. Bobo continues to certify Mr. Denniston's AUO and attendance documents.

The whistleblower also alleged that Mr. Bobo falsifies his time and attendance sheets by claiming he worked two to three hours of AUO daily but fails to work any additional hours or fails to perform duties that qualify for AUO. The whistleblower also alleged that all employees in the ERO office are instructed to work 9.5- to 10-hour days, and to claim AUO rather than "'45 Act" overtime pay.¹ According to the whistleblower, AUO is claimed when performing either controllable or administrative work such as training, surveillance, and paperwork.

* * * *

In these cases, there is a substantial likelihood that the information the whistleblowers provided to OSC discloses violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. As stated above, these are two of twelve allegations of AUO abuse that I have referred to you or your predecessor in the past 16 months.² It is evident that AUO abuse is a systemic problem occurring throughout DHS. I am encouraged that in response to my previous referrals, a comprehensive, department-wide audit of the use of AUO has been initiated. Decisive steps should be taken immediately to ferret out and curb AUO abuse throughout the Department.

¹ The Federal Employee Pay Act of 1945, often referred to as "FEPA," "Title 5," or "'45 Act" overtime, allows certain federal employees to pursue overtime pay claims for work officially ordered or approved in excess of a forty hour workweek. See 5 U.S.C. § 5542 (2011).

² The previously referred cases are OSC File Nos. DI-12-1105; DI-13-0002; DI-13-1556; DI-13-2853/3516; DI-13-4124; DI-13-3418; DI-14-0539; DI-14-0666; DI-14-0631; DI-14-0581.

The Special Counsel

The Honorable Jeh Charles Johnson

January 24, 2014

Page 4 of 5

OSC is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a) and (b). If I find, on the basis of the information disclosed, that there is a substantial likelihood that one of these conditions exists, I am required to advise the appropriate agency head of my findings, and the agency head is required to conduct an investigation of the allegations and prepare a report *within 60 days of notification of the allegations*. 5 U.S.C. § 1213(c) and (g). OSC will not routinely grant an extension of time to an agency in conducting a whistleblower disclosure investigation. However, OSC will consider an extension request where an agency concretely evidences that it is conducting a good faith investigation that will require more time to successfully complete.

Upon receipt, I will review the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). I will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

As previously stated, there is a substantial likelihood that the information the whistleblowers provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. I am referring this information to you for an investigation of these allegations and a report of your findings within 60 days of your receipt of this letter. By law, this report should be reviewed and signed by you personally. Nevertheless, should you delegate your authority to review and sign the report to the Inspector General, or other agency official, the delegation must be specifically stated and *must include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5)*. The requirements of the report are set forth at 5 U.S.C. § 1213(c) and (d). A summary of section 1213(d) is enclosed. Please note that where specific violations of law, rule, or regulation are identified, these references are not intended to be exclusive. As you conduct your review of these disclosures and prepare your report, OSC requests that you include information reflecting any dollar savings, or projected savings, and any management initiatives related to these cost savings, that may result from your review.

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 allege retaliation once the agency is on notice of their claims. Should the whistleblowers be identified during the course of the investigation of this matter, I urge you to take all appropriate measures to ensure that those who report wrongdoing, are suspected of reporting wrongdoing, or who take part in investigations of alleged wrongdoing are protected from such retaliation and from other prohibited personnel practices. I also urge you to inform those charged with investigation of the allegations that retaliation is unlawful and will not be tolerated.

The Special Counsel

The Honorable Jeh Charles Johnson
January 24, 2014
Page 5 of 5

At the outset, or during the course of your investigation, your investigative team may have questions regarding the statutorily mandated report you will deliver to OSC under 5 U.S.C. § 1213. OSC attorneys are available at any time in person or by telephone to discuss OSC's statutory process, expectations for credible, consistent, and complete reports, and for general assistance. Please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 254-3604 to initiate this process.

As required by 5 U.S.C. § 1213(e)(3), I will send copies of the report, along with any comments on the report from the whistleblowers and any comments or recommendations from me, to the President and the appropriate oversight committees in the Senate and House of Representatives. Unless the report is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs, OSC will place a copy of the report in a public file in accordance with 5 U.S.C. § 1219(a). To prevent public disclosure of personally identifiable information (PII), OSC requests that you ensure that the report does not contain any sensitive PII, such as Social Security numbers, home addresses and phone numbers, personal e-mail addresses, dates and places of birth, and personal financial information. OSC does not consider names and titles to be sensitive PII requiring redaction. Agencies are requested not to redact such information in reports provided to OSC for the public file.

Please refer to our file numbers in any correspondence on these matters. If you need further information, please contact Ms. McMullen. I am also available for any questions you may have.

Sincerely,



Carolyn N. Lerner

Enclosure

cc: Carlton I. Mann, Chief Operating Officer, DHS Office of Inspector General

Enclosure

Requirements of 5 U.S.C. § 1213(d)

Any report required under subsection (c) shall be reviewed and signed by the head of the agency¹ and shall include:

- (1) a summary of the information with respect to which the investigation was initiated;
- (2) a description of the conduct of the investigation;
- (3) a summary of any evidence obtained from the investigation;
- (4) a listing of any violation or apparent violation of law, rule, or regulation; and
- (5) a description of any action taken or planned as a result of the investigation, such as:
 - (A) changes in agency rules, regulations or practices;
 - (B) the restoration of any aggrieved employee;
 - (C) disciplinary action against any employee; and
 - (D) referral to the Attorney General of any evidence of criminal violation.

In addition, we are interested in learning of any dollar savings, or projected savings, and any management initiatives that may result from this review.

To prevent public disclosure of personally identifiable information (PII), OSC requests that you ensure that the report does not contain any sensitive PII, such as Social Security numbers, home addresses and phone numbers, personal e-mail addresses, dates and places of birth, and personal financial information. With the exception of patient names, OSC does not consider names and titles to be sensitive PII requiring redaction. Agencies are requested not to redact such information in reports provided to OSC for inclusion in the public file.

¹ Should you decide to delegate authority to another official to review and sign the report, your delegation must be specifically stated.