



**U.S. Customs and  
Border Protection**

APR 17 2013

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

RE: OSC File No. DI-13-0002

Dear Ms. Lerner:

The enclosed report is in response to your referral of allegations that employees of the Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) Commissioner's Situation Room, located 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 a whistleblower who requested anonymity. By letter dated January 2, 2013, OSC referred these allegations and a request for an investigation to the Honorable Janet Napolitano. On February 1, 2013, the matter was referred to the CBP Office of Internal Affairs for investigation. I was designated as the official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213. The findings are presented in the enclosed report.

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

Sincerely,

A handwritten signature in black ink, appearing to read "James F. Tomsheck".

James F. Tomsheck  
Assistant Commissioner  
Office of Internal Affairs

Enclosure

cc: Secretary  
Deputy Secretary  
Under Secretary for Management  
General Counsel  
Deputy Commissioner of CBP Performing the duties of the Commissioner of CBP  
Acting Deputy Commissioner

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

A whistleblower alleged to the Office of Special Counsel (OSC) that employees of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) Commissioner's Situation Room (CSR), 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 whistleblower has requested anonymity.

On January 2, 2013, the OSC referred these allegations and a request for investigation to DHS Secretary Janet Napolitano. On February 1, 2013, the matter was assigned to CBP, Office of Internal Affairs (IA) for investigation. Field investigative work began on February 14, 2013, at the CBP-IA Washington Field Office (WFO).

In brief, the whistleblower alleged the following:

- Numerous CSR employees regularly abuse the use of Administratively Uncontrollable Overtime (AUO); and
- The CSR Director and Assistant Director authorize and abet the improper use of AUO, and abuse it themselves.

## 2. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

CBP-IA agents from the WFO, conducted investigative interviews of Border Patrol Agents (BPA) and Customs and Border Protection Officers (CBPO) assigned to the CSR between February 14, 2013, and March 4, 2013. Local time and attendance (T&A) sheets and other documents were obtained and reviewed.

In addition, the following references were consulted for guidance:

- U.S. Customs Service (USCS) Payroll System Handbook (June 1993)
- Title 5, Code of Federal Regulations
- U.S. Immigration and Naturalization Service (INS) Policy Statement 1.3.103, Administratively Uncontrollable Overtime Pay (January 2000)
- INS Administrative Manual Procedures (AM) 1.3.103, Administratively Uncontrollable Overtime Pay (January 2000)
- INS Administratively Uncontrollable Overtime Training Guide (September 22, 1997)
- USCS Directive No. 51550-004A, Administrative Uncontrollable Overtime (June 29, 2000)
- CBP Payroll Time and Attendance Manual (2006)
- Border Patrol Memorandum, Use of Administratively Uncontrollable Overtime Guidance (December 10, 2012)
- T&A files, T&A records from the CBP Overtime Scheduling System (COSS)

CBP-IA Integrity Programs Division (IPD) Operational Analysis Specialists conducted research utilizing COSS which Office of Border Patrol (OBP) uses to process its payroll.

It should be noted that CBPOs, except for the Senior Watch Officers (SWO), are paid overtime by means of the Customs Overtime Pay Reform Act (COPRA) and are not entitled to AUO.

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

- CBPO Martin Whalen
- CBPO Martin Drake
- CBPO Jose Duccos-Bello
- CBPO Harry Wong
- CBPO Sapphia Small
- CBPO Lorne Campbell (SWO)
- BPA Albert Herrera
- BPA Jaime Estrada
- BPA Jakob Bollini
- BPA Robert Scholes (SWO)
- BPA Sergio Echazarreta (SWO)
- BPA Allen Halls
- BPA Reymundo Enriquez
- BPA Wesley Wood
- BPA Richard Cantu
- BPA Susan Roberts
- BPA Michael Smith
- BPA Jeffery Kalitan (no longer assigned to the CSR)
- BPA Tasha Wilcox (no longer assigned to the CSR)
- BPA Kevin Cinco (no longer assigned to the CSR)
- BPA Romuald Jovero (no longer assigned to the CSR)
- BPA Carl Jaigobind (no longer assigned to the CSR)
- BPA Ricardo Herrera (no longer assigned to the CSR)
- BPA Lucas Farrar (no longer assigned to the CSR)
- BPA Armando Moralez (no longer assigned to the CSR)
- BPA Eric Kuhn (no longer assigned to the CSR)
- BPA Patricia McGurk (no longer assigned to the CSR)
- BPA Marc Stratman (no longer assigned to the CSR)
- BPA Andrew Lewis (no longer assigned to the CSR)
- BPA Alfredo Nieto Jr. (no longer assigned to the CSR)
- Assistant Director Matthew Hanna
- Former Director Margaret McGrath

### 3. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION

The investigation confirmed the following allegations made by the whistleblower:

- Numerous CSR employees regularly abuse the use of AUO, and
- The CSR Director and Assistant Director authorize and abet the improper use of AUO.

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

### 4. INVESTIGATIVE FINDINGS

#### A. Background

The CSR is comprised of approximately 32 personnel, 15BPAs from the OBP (one member is currently on temporary duty), 15 CBPOs from the Office of Field Operations (nine members are currently on temporary duty), an Assistant Director and a Director. A SWO (supervisor) is always on duty in the CSR.

Highlights of the CSR:

- Serves as an Incident Command Center, Crisis Action Team Center, Emergency Operations Center, and central information coordination and communications hub for CBP in times of significant emerging events and national incidents.
- Provides real-time 24/7 operational and intelligence reporting to provide situational awareness and inform decision makers across the CBP complex.
- Provides indications, watch and warning activities across the agency.
- Manages information flow to and from the DHS National Operations Center (NOC)
- Liaisons and coordinates with other DHS Component Operations Centers and state, local and tribal fusion centers.
- Provides multiple CBP situational awareness capabilities.
- In Fiscal Year 2012, the CSR received over 13,000 initial Significant Incident Reports from the field, produced over 4,000 High Priority emails to senior leadership, responded to over 300 Requests for Information from DHS NOC and produced over 350 Spot Reports on critically sensitive incidents that warranted the attention of the DHS Secretary

#### B. Relevant Regulations

5 C.F.R. § 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. § 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. § 550.153(e) further provides that:

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

- (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."

### C. Relevant Policies

As noted above, the current CBP workforce has continued to reference guidance and policies from the previous agencies who administered AUO (i.e., INS and USCS). Throughout this report, reference will be made to both the INS and USCS 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 USCS 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 findings in this report demonstrate that OBP personnel, as legacy-INS employees, would not necessarily have sought the legacy USCS Payroll System Handbook as a source of guidance with regard to use of AUO and instead would have referred to the INS AM. Because both the USCS Payroll System Handbook and the INS AM mirror the requirements in the law and regulations for the proper payment of AUO, the investigation refers to both documents.

*i. The USCS Payroll System Handbook*

The USCS Payroll System Handbook, Chapter 8, Premium Pay, restates the requirements of the law governing the administration of AUO. Although still titled as a USCS document, the USCS Payroll System Handbook is now used by CBP's Office of Administration, Payroll Branch, as the policy governing the administration of payroll for all CBP employees.

Chapter 8 of the USCS Payroll System Handbook states that the requirements for authorizing AUO for a position are as follows:

A position must meet the following four requirements in order to have AUO payments approved. All four requirements must be met; 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 calendar quarters and the nature of the assigned duties must point to an ongoing need to perform substantial amounts of irregular overtime.

*ii. The INS Administrative Manual Procedures*

The INS Administrative Manual Procedures (AM) remains in effect, unless superseded, due to the savings provision contained in the Homeland Security Act of 2002.

The INS AM, Section 1.3.103, contains the following relevant information:

AUO is defined as 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.

The "Record of AUO Hours Worked" (Form G-1012) was the official record of AUO hours worked by every employee who earned AUO. The INS AM procedure required that it be signed every pay period by the employee and by the immediate supervisor. A copy of the form was to be filed for a minimum of six years in the T&A Folder of each employee on AUO, and available for review by interested parties.

For an employee to be approved to receive AUO, a determination must 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 INS AM also provides examples of incorrect applications of administratively uncontrollable overtime 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;

D. The payment of AUO to CSR employees is inconsistent with Section 1.3.103 of the INS AM.

The CBP-IA agents determined that the payment of AUO to CSR employees is inconsistent with Section 1.3.103 of the INS AM because the investigation established that the AUO documented and claimed by OBP BPAs assigned to the CSR is controllable, administrative in nature, and functionally extends their daily shift by two hours each day.

The interviews of the CSR personnel revealed that as a general matter, BPAs work a 0600 hours to 1400 hours shift, a 1400 hours to 2200 hours shift, or a 2200 hours to 0600 hours shift, with two 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. Most of this work is administrative in nature, often consisting of Headquarters or local taskings.

Prior to December 2012, CSR personnel did not record the actual work performed that comprises AUO on any forms in conformance with the INS AM. Each BPA interviewed referenced the use of the legacy INS Form G-1012 to document such work while they were assigned to a field element. OBP utilizes an electronic medium to capture overtime data in COSS.

*COSS Data Review of the CSR*

CBP-IA IPD conducted a data query through COSS of the daily shift schedules of the CSR OBP personnel for the time period June 2012 through January 2013. A review of these work schedules revealed that at the end of each employee's normal eight hour work shift, an additional two hours of AUO were claimed a majority of the time, giving the appearance that the two hours are controllable. Specifically, the review of the COSS data for CSR BPAs for the time period June 2012 through January 2013 shows that two hours of AUO were reportedly worked immediately following the assigned shift 89% of the time.

E. The payment of AUO to BPAs and management is inconsistent with 5 C.F.R. §§ 550.151 & 550.153.

5 C.F.R. § 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 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. § 550.153(e)(2) further provides that "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."

The investigation determined that the primary use of AUO at the CSR is to provide a transition for the three regularly scheduled shifts per day. Substantial amounts of overtime are worked at the CSR, but according to 5 C.F.R. §§ 550.151 & .153, these hours should not have been claimed as AUO. The BPAs are aware of qualifying AUO duties that occur occasionally, but described the most frequent use of AUO as routine administrative duties. 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.

SWOs stated that they do not require BPAs to work a ten-hour day. They acknowledge that all BPAs are aware that to claim 25% AUO pay, an employee must work approximately two hours of AUO each day.

F. The payment of AUO to BPAs and management is inconsistent with the September 22, 1997 legacy-INS AUO Training Guide.

Section 1.3.103 of the INS AM 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 BPAs. 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.

CBP-IA agents determined that the payment of AUO to CSR employees is inconsistent with the legacy-INS AUO Training Guide because interviews of the CSR BPAs indicated that they did not record their actual AUO qualifying work on any paper forms prior to December 2012 while assigned to the CSR. They each refer to the prior use of the legacy Form G-1012 to document such work prior, while they were assigned to a field element. Depending on which field element they came from and the application of the electronic format through COSS, the use of the paper forms was often ceased.

The investigation also revealed that CSR OBP personnel do not complete Form G-481, Daily Unit Assignment Logs or Biweekly Assignment Logs, Form G-259a.

#### G. Issues

- Issue 1: Insufficient Documentation of Certification of AUO Rate and of Eligible Hours Worked each Pay Period.*

The relevant policies and guidance on this issue state as follows:

Section 1.3.103 of the INS AM mandates the use of a certification process for the payment of AUO. The BPA and Supervisory BPA positions 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 pay periods and the eligibility period is four pay periods. The signed certificate should be retained for six 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.

Form G-1012 is the official paper record for AUO hours worked by BPAs. Section 1.3.103 of the INS AM mandates the use of Form G-1012. It is signed every pay period by the employee and by the immediate or higher level supervisor. Form G-1012 describes the overtime duties performed in support of AUO hours.

As stated in the USCS Payroll System Handbook, a substantial amount of irregular overtime by itself is not sufficient to authorize AUO. Instead, the following four requirements must be met:

- (1) The hours of duty cannot be controlled administratively.
- (2) Substantial amounts of irregular overtime are required.
- (3) The employee is generally responsible for recognizing, without supervision, when to remain on or return to duty.
- (4) There must be a sound basis for anticipating that such requirement will be ongoing.

Part II of the September 22, 1997 legacy-INS AUO Training Guide, the principal training document currently relied upon in the field by OBP, states in part that:

- The original AUO 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 AUO certification form must be replaced with a new AUO certification at the beginning of each fiscal year.

Chapter 8 of the USCS Payroll System Handbook specifically requires AUO-eligible employees to complete the CF [Customs Form] 203 in enough detail to note the number of hours worked and the tasks performed that meet the requirements for coverage as AUO hours.

Customs Directive No. 51550-004A, dated June 29, 2000, requires employees earning AUO to submit monthly AUO sheets (now CBP Form 203, dated 09/03) 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. Form G-1012 serves the same purpose for OBP.

The CBP-IA IPD investigation revealed the following factual findings and conclusions.

The investigation revealed deficiencies in the CSR'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 AUO pay he or she receives.

The local records maintained for BPAs assigned to the CSR 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.

The investigation revealed that, until December 2012, there were no paper forms in use by CSR BPAs 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 G-1012. Based upon the witness testimony and the documentary evidence, the investigation revealed that the CSR did not currently use the Form G-1012 until December 2012 and did not use the Form G-1012 during the period of June 2012 through December 2012. The type of work performed is not evaluated for the purpose of establishing AUO eligibility on the Form G-1012.

The number of AUO hours are tracked on a T&A worksheet, entered into COSS by the BPA and approved by a supervisor. The CSR maintains a worksheet to track the AUO and the excludable hours claimed by computation period to determine the percentage of AUO each BPA is eligible to earn. 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 CSR certification process.

This investigation revealed that the certification process as described in the relevant policies and guidance documents above is not fully utilized to determine AUO eligibility.

*Issue 2: Previous warnings regarding Proper Use of AUO were disregarded.*

On January 14, 2008, the Chief, OBP, issued a memorandum to all Sector Chief Patrol Agents on the use of AUO at checkpoints. This document states,

“The 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 criteria for justifying approval of AUO premium pay as found in the USCS Payroll System Handbook. These requirements must be met for those certified AUO positions and is not limited to checkpoint operations. Criteria number three concludes with the statement, “However, if such continuation of infrequent work becomes more than irregular and there is a discernible 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 also 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.”

In contrast to the policies outlined in the January 14, 2008 memorandum, this investigation and review of the T&A files, T&A records from COSS and the U.S. Department of Agriculture National Finance Center (NFC) payroll records for BPAs assigned to the CSR confirm a pattern of work assignments that are controllable by scheduling at the CSR.

Based upon the documentary evidence and witness testimony, it is evident that the regular and consistent addition of two hours of AUO to the regularly scheduled eight hour day implies hours of duty are controllable by management. Based on the information collected, the use of AUO at the CSR appears to be comprised of routine duties controllable by the hiring of additional personnel or rescheduling of hours of duty. For example, CBPOs routinely transfer their work from shift to shift while the BPAs continue to work on AUO.

## 5. DESCRIPTION OF ACTION TAKEN OR PLANNED

### A. Action Taken by OBP to address the proper payment of AUO.

As noted above, in January 2008, the then Chief, OBP, issued a memorandum regarding the application of AUO at checkpoints staffed by BPAs. While the memorandum addressed issues in context of the checkpoint, it also addressed basic procedures and expectations for application of AUO; however, it did not delve into the documentation requirements of AUO.

In July 2012, CBP socialized a draft agency-wide directive for AUO and overtime and established an AUO working group. Currently, CBP continues to administer AUO according to law, regulation, and under legacy directives, regulations, and bargaining agreements since the inception of CBP in 2003. At times this has resulted in intra-agency misconceptions and confusion, as well as potentially diminished consistency in application.

In December 2012, OBP recognized a need to disseminate additional and specific guidance regarding the judicious use, documentation, and certification of AUO. On December 10, 2012, Michael J. Fisher, Chief, OBP signed a memorandum, Subject: "Administrative Uncontrollable Overtime Guidance." The text of the memorandum reads as follows:

"The purpose of this memorandum is to emphasize and summarize existing guidance regarding the administration and management of Administratively Uncontrollable Overtime (AUO). Employees in positions in which overtime hours cannot be controlled administratively, and which require substantial amounts of irregular or occasional overtime duty with the employees generally being responsible for recognizing (without supervision) circumstances requiring them to remain on duty or to return to work outside of regular duty hours, may be paid AUO for such irregular or occasional overtime work, in accordance with Title 5 United States Code (U.S.C.) § 5545(c) (2), Code of Federal Regulations (C.F.R.) § 550.151-164, and the Administrative Manual (AM), Section 1.3.103 . . . .

The guidance contained within this memorandum is derived from current law, regulation, policy, and procedure that is applicable to the U.S. Border Patrol. Section 1.3.103 of the

AM contains additional guidance about AUO from the Office of Personnel Management (OPM) to assist in complying with the law and OPM regulations. This includes the August 1, 1975, Department of Justice (DOJ) Order No. 1551.4A on AUO. The DOJ order served a dual purpose: to implement AUO as the primary premium pay for Border Patrol and to 'establish policy and procedures governing the payment of AUO.'

There are four specific criterion that a position must meet to be authorized and deemed eligible for payment of AUO, as outlined in 5 CFR § 550.153:

- a) The hours of duty cannot be controlled administratively (i.e., by hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required);
- b) To satisfactorily discharge the duties of the position, employee is required to perform substantial amounts of irregular or occasional overtime work, which is:
  1. An average of at least three hours a week of that irregular or occasional overtime work;
  2. A continual requirement, generally averaging more than once a week;
  3. There is a definite basis for anticipating such overtime work will continue to meet the minimum requirements under paragraphs b (1) and (2) above;
- c) The employee is responsible for recognizing (without supervision) circumstances that require him or her to remain on duty. This responsibility must be a definite, official, and special requirement of the position. This responsibility is not merely because it is desirable, but because of compelling reasons inherently related to continuance of the employee's duties and that failure to do so would constitute negligence.
- d) Based on the circumstances, the employee has no choice as to when or where they may perform the work in continuation of a full daily tour of duty or resumes duty in accordance with a prearranged plan or an awaited event.

Mere occupancy of an authorized position does not qualify an employee for AUO pay. However, once a position has been authorized to receive AUO, AUO is the appropriate compensation for any irregular or occasional overtime work.

To comply with laws and regulations pertaining to the management, administration, and proper use of AUO, the following steps must occur:

- o Documentation of AUO on Form G-1012. This form documents the duties and principal activities performed in continuation of the daily tour of duty. This also includes those irregular or occasional activities not assigned or predicted to occur during the work day that requires the employee to continue working to complete previously assigned duties. Use of the phrase "Continuation of duties" is not acceptable, because it does not adequately describe the duties performed in continuation of the daily tour of duty or explain why continuation was necessary at that time.

- Employees should be mindful that the hours documented on the G-1012 mirror the hours documented in time and attendance records. Form CBP-203 also may be used for this purpose, if that is the current practice.
- If the type of work performed is not adequately described in the documentation provided, the supervisor should return the form to the employee for clarification and should not certify the AUO claim unless clarification is received.
- Claim AUO in quarter-hour increments. This assures adherence to the quality controls that management should be employing in accordance with 5 CFR 550.112. When AUO is performed in other than the full quarter-hour, the minutes shall be rounded up or down to the nearest quarter-hour.
  - Rounding up, breaking the half hour to claim one hour, automatic "twos," and pre-scheduling of AUO is prohibited by law.
- Claim what is worked. Claiming more hours than those hours actually worked is unlawful and may subject the agent to disciplinary and/or criminal action. Moreover, claiming fewer hours than those hours actually worked is inaccurate. FLSA Exempt employees who earn AUO are still required to record the actual number of AUO hours worked and provide an adequate description of the work performed so that the supervisor is able to certify the hours for AUO coverage.
- Work what is required. AUO should be used judiciously and only to perform the principal activities an employee is assigned to work with the employee generally being responsible for remaining on duty when required by the circumstances. Simply waiting for relief (except in unusual circumstances), performing routine post-shift activities upon completion of the employee's tour of duty are not certifiable for purposes of computation of AUO. AUO is not a pay entitlement; rather, it is a premium pay that is best suited for U.S. Border Patrol agents to accomplish the Border Patrol mission.
- Management of AUO. Management is required to ascertain whether work performed in excess of an eight-hour shift was required and whether AUO is the proper premium pay to compensate the employee for that work. Employees and management are equally responsible for the proper implementation of AUO. There is no requirement that allows for an employee to continue working when an authorized supervisor has given a direct order to stop working.
- Supervisory responsibilities include, but are not limited to:
  - Determining that work claimed has been performed;
  - Determining if specific duties warrant AUO certification;
  - Determining whether the documentation provided by the employee is sufficient;
  - Determining appropriate AUO percentage rate based on past history or expectations;
  - Forwarding AUO certification form to servicing Human Resources office;
  - Ensuring AUO authorized employees are averaging at least three hours every week of AUO, before certifying;
  - Completing new AUO certification form at the beginning of the fiscal year;

- Decertifying employee from AUO when warranted; and
- Reviewing monthly overtime report.
- Management responsibilities include, but are not limited to:
  - Oversight and review at Border Patrol Headquarters and Sector Headquarters;
    - Payroll audits;
    - Operational site visits;
    - Personnel management evaluation reviews;
    - Overtime training;
    - Monitor effect of changes in AUO usage on budget; and
    - Hold supervisors accountable for their AUO certifications.”

In addition to the January 2008 Checkpoint Memorandum, the July 2012 draft directive and working group, and the December 2012 AUO Guidance Memorandum, OBP Sector Chief Patrol Agents are monitoring AUO usage and reducing it through management controls where an opportunity to do so exists. OBP is also monitoring AUO and maintaining a dialogue with the Sector Chief Patrol Agents; however, AUO usage is predicated on the requirement and effectuation of work.

B. Action Planned by OBP to ensure the proper payment of AUO.

The CBP-IA IPD investigation revealed that OBP intends to take the following action:

CBP continues to work towards a unified and simplified agency-wide directive on AUO; however, it cannot be fully implemented until all bargaining obligations are met with the National Treasury Employees Union (NTEU) and the National Border Patrol Council (NBPC).

OBP believes that a key element of any future action by the Agency is to engage the U.S. Office of Personnel Management with courses of action, language, and agency requirements in order to modernize the concept of AUO. The conflict with AUO practice rests within the regulations, and not necessarily or predominately with the established law under Title 5 of the United States Code. The regulations are primarily directed at a criminal investigator, who would fall under the Federal Law Enforcement Availability Pay (LEAP) Act of 1994. AUO is not centric to a particular career, but rather the principles of irregular or occasional overtime set forth in 5 U.S.C. § 5545. OBP believes the regulations should be updated to include irregular or occasional overtime functions of a wide variety that represent agency requirements of a technologically driven pace, immediate access to information, and immediate mitigation or resolution.

CBP uses AUO, LEAP, COPRA, the Federal Employees Pay Act, the Fair Labor Standards Act, and compensatory time off as overtime mechanisms according to the needs of the specific component. CBP and OBP continue to monitor current programs and look forward to the potential development of a revised pay or overtime system.

OBP has also developed a video to be shown to every employee, reiterating roles, responsibilities, and application of AUO.



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

The Special Counsel

January 2, 2013

The Honorable Janet Napolitano  
Secretary  
Department of Homeland Security  
U.S. Department of Homeland Security  
Washington, D.C. 20528

Re: OSC File No. DI-13-0002

Dear Madam Secretary:

Pursuant to my responsibilities as Special Counsel, I am referring to you a whistleblower disclosure that employees of the Department of Homeland Security (DHS), Customs and Border Protection, Commissioner's Situation Room (CSR), 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 these allegations from a whistleblower who has requested anonymity.

In brief, the whistleblower alleged the following:

- Numerous CSR employees regularly abuse the use of Administratively Uncontrollable Overtime (AUO); and
- The CSR Director and Assistant Director authorize and abet the improper use of AUO, and abuse it themselves.

The U.S. Office of Special Counsel (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 ordinarily 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.

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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).

The CSR, located at CBP Headquarters, is responsible for providing crucial information, including breaking news, to the Commissioner and Headquarters executive staff members. According to the whistleblower, the CSR is staffed by both Border Patrol Agents (BPAs) and Senior Watch Officers (SWOs) working three eight-hour shifts, 24-hours per day. The whistleblower alleged that CSR employees have abused the use of AUO pay by remaining at their duty stations two hours after the end of their regularly scheduled eight-hour shift on a daily basis. 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. § 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(e)(2).

The whistleblower's allegations are based upon both personal observation and access to employee time and attendance records. According to the whistleblower, it is common for CSR employees to work their regular shift and then spend two additional hours at their duty station relaxing, joking around, surfing the internet, and taking care of personal matters. These remaining employees rarely, if ever, continue to work during their additional two hours. Further, according to the whistleblower, CSR employees are required to monitor multiple television news stations as part of their duties and employees who "work" overtime frequently switch the televisions over to sports and entertainment channels for personal enjoyment. This practice renders these televisions unavailable for official use by CSR employees arriving for the next eight-hour shift. Finally, the whistleblower has heard comments from a number of CSR employees regarding the AUO hours noting that, "if the Government came in and investigated our AUO, we'd be screwed" and "this AUO deal is paying for my kids to go to college."

The whistleblower indicated that the following CSR employees have abused AUO:

- Sergio Echazarreta (SWO)
- Reymundo Enriquez (BPA)
- Jamie Estrada (BPA)
- Eric Kuhn (BPA)
- Susan Roberts (BPA)

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- Michael Smith (BPA)
- Tasha Wilcox (BPA)
- Jeffery Kalitan (BPA)
- Jakob Bollini (BPA)
- Ricardo Cantu (BPA)
- Kevin Cinco (BPA)
- Albert Herrera (BPA)
- Romuald Jovero (BPA)
- Allen Hall (BPA)
- Wesley Wood (BPA)
- Robert Scholes (SWO)
- Andy Lewis (SWO)
- Marc Stratman (SWO)
- Luke Farrar (SWO)
- Alfredo Nieto (SWO)
- Armando Morales (SWO)
- Carl Jaigobind (SWO)
- Patricia McGirk (SWO)
- Ricardo Herrera (SWO)

The whistleblower also alleged that both CSR Director Margaret McGrath and CSR Assistant Director Matthew Hannah have approved the improper use of AUO by CSR employees, and abused AUO themselves.

I have concluded that there is a substantial likelihood that the information provided by the whistleblower to OSC discloses a violation of law, rule, or regulation, gross mismanagement, an abuse of authority, and a gross waste of funds. As previously stated, 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 § 1213(d) is enclosed. Please note that where specific violations of law, rule, or regulation are identified, these specific references are not intended to be exclusive. As you conduct your review of these disclosures and prepare your report pursuant to section 1213(d), 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.

Further, in some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their claims. Should the whistleblower be identified during the course of

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the investigation of this matter, I urge you to take all appropriate measures to ensure that the whistleblower and any others who report wrongdoing are protected from such retaliation and from other prohibited personnel practices, including informing those charged with investigation of the allegations that retaliation is unlawful and will not be tolerated.

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 whistleblower 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 number in any correspondence on this matter. If you need further information, please contact Catherine McMullen, Chief of the Disclosure Unit, at (202) 254-3604. I am also available for any questions you may have.

Sincerely,



Carolyn N. Lerner

Enclosure

cc: Charles K. Edwards

Requirements of 5 U.S.C. § 1213(d)

Any report required under subsection (c) shall be reviewed and signed by the head of the agency<sup>1</sup> 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.

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