



U.S. Customs and
Border Protection

DEC 10 2012

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-12-1105

Dear Ms. Lerner:

The attached report is in response to your referral dated July 20, 2012, regarding allegations reported by Border Patrol Agent Miska Rodriguez. Agent Rodriguez alleged employees of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), Office of Border Patrol, Laredo North Station, Laredo, Texas, regularly leave their assigned zones prior to being relieved by the oncoming shift, leaving portions of the Mexico – U.S. border unsecured, and in so doing, are abusing the overtime pay system. The Secretary referred this inquiry to the CBP Office of Internal Affairs and designated me as the official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213.

The CBP Office of Internal Affairs has concluded the evidence does not support the allegations made by Agent Rodriguez. Please do not hesitate to contact my office should you require further information regarding these matters at (202) 344-1800.

Sincerely,

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

James F. Tomsheck
Assistant Commissioner
Office of Internal Affairs

Attachment

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

OSC File Number DI-12-1105

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

Border Patrol Agent Miska Rodriguez made allegations to the Office of Special Counsel (OSC) that employees of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), Office of Border Patrol, Laredo North Station, in Laredo, Texas are engaging in conduct that may constitute a violation of law, rule, or regulation and a substantial and specific danger to the public safety. Agent Rodriguez, who works at the Laredo North Station, alleged that Border Patrol Agents regularly leave their assigned zones prior to being relieved by the oncoming shift, leaving portions of the Mexico – U.S. border unsecured and in doing so, these Agents are abusing the overtime pay system.

On July 20, 2012, the OSC referred these allegations and request for investigation to DHS Secretary Janet Napolitano. On August 15, 2012, the matter was assigned to CBP, Office of Internal Affairs (IA), for investigation.

II. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

Interview of the Complainant

In accordance with OSC policy, Agent Rodriguez was interviewed at the beginning of the investigation and asked to provide additional information and an explanation of his allegations. During his interview, Agent Rodriguez specified the "Uppers" as the problem at the Laredo North Station that he was reporting to the OSC. The "Uppers" is a term commonly used by Agents working at Laredo North Station when referring to a 7-8 mile rural section of the Mexico – U.S. border North of Mines Road and the Loop 20 intersection in Laredo, TX. Agent Rodriguez alleged there are three separate issues that contribute to the Uppers being unsecure and additionally made a separate allegation regarding abuse of the AUO (Administratively Uncontrollable Overtime) pay system. 5 U.S.C. § 5545(c)(2).

Allegation 1: There are not enough Agents assigned to the Uppers to sufficiently patrol that area to stop smuggling, because too many Agents are assigned to work the highway and the checkpoint instead of being stationed on the physical border.

Allegation 2: Agents are often called in from the Uppers to help process aliens caught in other zones, which leaves that area of the border in the Uppers unsecure.

Allegation 3: Agents leave their shifts early before being properly relieved by the oncoming shift, which leaves the border unsecure between shifts.

Allegation 4: Agent Rodriguez also alleged that there is rampant abuse of the AUO pay system at the Laredo North Station. He said it has become a common and acceptable practice for Agents to work one hour and five minutes and claim two hours of AUO, and that Agents are in the habit of leaving five, ten, or fifteen minutes past the hour and claiming the whole hour as AUO worked.

Agent Rodriguez said an examination of the CBP Form G-481 "Daily" Unit Assignment Log would show a pattern of the Uppers not being patrolled as much as the other zones in Laredo North Station's area of responsibility. He said the main reason there are not enough Agents assigned to the Uppers is because there are too many Agents assigned to special smuggling interdiction units, or assigned to the interior of the country along the highway or at the checkpoint instead of being assigned to the physical border.

Additionally, he said Agents who are assigned to patrol the Uppers are usually the first ones called in to assist in processing aliens, which leaves the Uppers totally unsecure.

Agent Rodriguez disagrees with assigning Agents to patrol the highways and work the checkpoints and he believes Patrol Agent in Charge (PAIC) Oscar Maldonado does not care about the Uppers because it is a rural area where aliens do not cross as often. Agent Rodriguez believes that the Border Patrol should bring all the Agents from the interior of the U.S. and position them along the physical border with Mexico. He also believes PAIC Maldonado is in violation of an unspecified policy that mandates Border Patrol to station Agents along the border.

Agent Rodriguez is especially concerned with the Uppers being unsecure because he worries about terrorist groups such as Al-Shabaab (Somali terrorist group affiliated with Al-Qaeda) infiltrating the U.S. through an area like the Uppers, which he believes is loosely patrolled and unsecure. Agent Rodriguez said that Al-Shabaab "have pledged that they will cross some of their organization through the Southern border. They're working with the Mexican Cartels to cross some of their guys through our Southern border." "If they wanted to cross a cell of terrorists, they can through the Uppers of Laredo North." "If they really wanted to cross they could; those guys have money to pay top dollar to pay the Cartel to assign them the best guy they have and they can do it. Aliens cross every night and get away and they do it by themselves, so imagine a cell of terrorists guided by some of the best guys that the Cartels have. So that's my concern." When asked how he learned of this intelligence, Agent Rodriguez responded: "I read a lot and I see a lot of news and I think I saw that on Fox News." Agent Rodriguez also mentioned other potential terrorist crossings in California and Washington State and said he knew of the incidents because "it was in the news, I watch a lot of Fox News, MSNBC, CNN."

Agent Rodriguez believes "the border is the last thing they [Laredo North Station management] care about; that's the last thing in their mind. What they worry about is do I have enough people to process [aliens] so I can fill up planes so Mr. Jenkins [Deputy Chief Patrol Agent] is happy." "They care about statistics, look I caught this and I processed this many, but what they don't say, is like, hey I left the border wide open so I could process this."

Agent Rodriguez said Agents who are assigned to work the Uppers are the first ones to be called in to help process aliens and as a result there will be no one patrolling the Uppers. He said it is the area that Laredo North Station neglects. Agent Rodriguez provided an example of when he and his partner were called in to help process aliens, which resulted in his zone being left unsecure. Agent Rodriguez said there were other Agents at the Station that could have processed the aliens, or they could have passed the aliens to the next shift for them to process instead of calling them in from the Uppers and leaving that area of the border unsecure. Agent Rodriguez does not believe the Uppers are neglected intentionally by Border Patrol supervisors; he believes they are just overwhelmed.

Agent Rodriguez said he knows Agents leave their assigned zones before being relieved, because he personally used to leave his assigned zone in the Uppers before being properly relieved by the oncoming shift. Agent Rodriguez said his firsthand knowledge is from the last time he worked the Uppers, approximately one or two years ago. Beyond his firsthand experience from over a year ago, Agent Rodriguez had no specific examples of Agents who left their shift early before being relieved, but he believes it is happening.

Agent Rodriguez said he has observed many employees leave early from work and claim the whole hour as AUO worked. He believes there is abuse of the AUO payment system in the Border Patrol and the abuse is rampant at Laredo North Station.

Agent Rodriguez said that he left early one time two years ago with Agent Yoan Nunez and he thinks (although he is not sure) that Agent Nunez claimed two hours of AUO for that day. Agent Rodriguez said that he did not claim two hours of AUO on his official time because he left early that day. Agent Rodriguez also provided another more recent example from April 2012, when he and Agents Gomez and Santellan (first names unknown) left early one day and he thinks (although he is not sure) they claimed two hours of AUO, even though they did not work the full two hours that day. Agent Rodriguez said that he did not claim two hours of AUO for that day in April 2012.

When discussing his allegation of AUO abuse, Agent Rodriguez did not have specific and verifiable examples of Agents who abuse AUO time, but he believes that at least 50% of the Agents working at the Laredo North Station are abusing their AUO time. He agreed that surveillance conducted would prove that Agents claim more AUO time than they actually work. Agent Rodriguez was asked to provide a list of the five Agents whom he believed were the worst abusers of AUO at the Laredo North Station, and he provided the following list of names: Agents Yoan Nunez, King (first name unknown), Santellan (first name unknown), Medina (first name unknown), and Villasenor (first name unknown).

Agent Rodriguez said, "I guarantee you that if you follow some of these guys you are going to find evidence" of AUO abuse. Agent Rodriguez also believes that if asked, half of the Laredo North Station would confirm that AUO abuse is rampant and that the border is being left unsecure, especially the Uppers. Agent Rodriguez agreed that if ten Agents were selected at random, at least five of those Agents would confirm the allegations of AUO abuse and the border being unsecure.

Method of Investigation

In conducting this investigation, CBP-IA Special Agents pursued all of the recommendations made by Agent Rodriguez during his interview.

- CBP-IA Special Agents reviewed all of the CBP Form G-481 "Daily" Unit Assignment Logs for the Laredo North Station during the month of August and analyzed the number of Agents assigned to the Uppers for each day.
- CBP-IA Special Agents performed surveillance of the alleged five worst abusers of AUO at the Laredo North Station, observing them during a one week timeframe, which included a combined 38 hours of claimed AUO time.
- CBP-IA Special Agents interviewed ten Border Patrol Agents at the Laredo North Station who volunteered prior to being told the subject of the interview or the questions they would be asked. Seven of the volunteers were journeyman level Agents and three were first line supervisors.
- CBP-IA Special Agents also interviewed Acting Deputy Patrol Agent in Charge (DPAIC) Manuel Martinez III at the Laredo North Station to answer questions regarding how Agents are assigned to particular zones, how it is determined which Agents are called in from the field to help process aliens, and what the policy is regarding Agents being relieved by the oncoming shift.

III. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION

Review of "Daily" Unit Assignment Logs

A review of the CBP Form G-481 "Daily" Unit Assignment Logs for the Laredo North Station during the month of August revealed that there were Border Patrol Agents assigned to the Uppers every day. In addition to "regular" Agents, there were also Special Operations Group (SOG), or BORTAC (Border Patrol Tactical) Agents, and/or Special Interdiction Group (SIG) Agents assigned to the Uppers for 18 days of the 31 days in August.

Surveillance conducted at Laredo North Station

The results of surveillance conducted on the alleged five worst abusers of AUO at Laredo North Station during the week of September 10, 2012, covering 38 hours of claimed AUO, revealed that Agents worked an average of 57 minutes for every hour of AUO they claimed.

Voluntary interviews of Agents at Laredo North Station

The ten Agents who volunteered to be interviewed were asked questions regarding potential AUO abuses, their understanding of the AUO policy at Laredo North Station, if they believed Agents left their shifts before being relieved, and if they believed the Mexican – U.S. border was unsecured because of those issues. Not one of the Agents interviewed confirmed Agent Rodriguez' allegations and their responses were consistent in their understanding of the AUO policy, stating they are told constantly by their supervisors to, "Claim what you work and work what you claim."

Interview of DPAIC Martinez

DPAIC Martinez explained that there is no specific policy that requires Agents to relieve each other, but it is part of the job and something everyone does and is expected to do. In some locations Agents are expected to do a face to face relief, but in the "Uppers," it is common for Agents to call out on the radio to relieve the outgoing shift because the area is so large. Supervisors and the Management Team at Laredo North Station monitor the radio traffic and can hear the Agents relieving each other on the radio every day. DPAIC Martinez does not believe that Agents are leaving their assigned shifts early, because he personally hears them relieve each other on the radio every day.

DPAIC Martinez stated there are SOG and SIG Agents which are assigned to the Uppers every day to augment the regular Agents, which are also assigned to the Uppers every day. Regular Agents are not notified of where the SOG or SIG Agents are going to be operating; only the Field Operations Supervisor (FOS) and Supervisory Border Patrol Agents are notified where those special teams are going to be located so they can appropriately coordinate the areas being patrolled. Additionally, the Entry Control Team (EIT) "cuts the road for sign" every shift for the entire length of the border in Laredo North's area of operations, including the Uppers.

DPAIC Martinez explained that in June of 2012, the Laredo North Station instituted the Laredo Sector Processing Center and now Agents bring in their apprehensions to the Station and turn them over to the Processing Center. Prior to establishment of the Processing Center, the Agents assigned to the lowest priority zones were called in to assist in processing aliens if there was a large apprehension. The Uppers were the lowest priority at that time because it was already covered by SOG and SIG Agents. Reassigning Agents patrolling the Uppers made sense because the Uppers were already covered.

DPAIC Martinez explained that the Laredo Sector assigns the zones (9-17) to Laredo North Station and the PAIC establishes the priorities based on intelligence and trends. The PAIC's priorities will shift based on the intelligence and trends, but the three current priorities are the physical border, the highways and the I-35 checkpoint. DPAIC Martinez said they have many seizures along the highway and at the checkpoint, and it would be irresponsible to abandon those areas to station all the Agents along the physical border. He said it is a balanced approach based on experience and past history. DPAIC Martinez said the logs on "e3" processing breaks down the apprehensions and seizures by zone and/or checkpoint and that information is used to allocate resources and Agents as necessary to combat smuggling activities.

IV. INVESTIGATIVE FINDINGS

Allegation 1: Not enough Agents assigned to the Uppers

The evidence does not support the allegation of the Uppers being left unsecure because of Agent assignments. Agent Rodriguez was not aware of the SOG and SIG Agent assignments when making his allegation because regular Border Patrol Agents are not told about when and where these special teams will be patrolling. Additionally, SOG and SIG Agents have their own "Daily" Unit Assignment Logs that regular Agents cannot see, this gave Agent Rodriguez the impression that only a few Agents were assigned to the Uppers, when on many days there were multiple SOG and SIG Agents patrolling that area. A review of all the "Daily" Unit Assignment Logs confirms that the Uppers were not left unsecure as alleged by Agent Rodriguez.

Agent Rodriguez has a philosophical disagreement with how Agents are assigned to patrol the border. He does not believe any Agent should be assigned to the highway or checkpoint, and he believes all Agents should be stationed along the physical border. There is no policy violation regarding how and where Agents are assigned within Laredo North Station's area of responsibility. Based on the interview of DPAIC Martinez, it appears that Laredo North Station management relies on intelligence, trends, and statistics when deciding where to assign Agents, which is constantly evaluated and adjusted to allocate resources as necessary to combat smuggling activities.

Allegation 2: Agents called in from the Uppers to help process aliens

The evidence does not support the allegation of the Uppers being left unsecure because of Agents being called in to assist with processing aliens. Although it was true that Agents were often called in from the Uppers to help process aliens caught in other zones, their absence did not leave the border unsecure because there were already SOG and SIG Agents patrolling the Uppers. It would have appeared to Agent Rodriguez that the Uppers were left unsecure, but he was not aware of the SOG and SIG Agents that were also patrolling the area. DPAIC Martinez explained that Agents patrolling the Uppers were the lowest priority and the first ones called in to help process aliens, because the area was already covered by SOG and SIG Agents patrolling that area.

Allegation 3: Agents leave their shifts early before being properly relieved

The evidence does not support the allegation that Agents leave their shifts early before being properly relieved. DPAIC Martinez explained that there is no specific policy that requires Agents to relieve each other, but it is part of the job and something everyone does and is expected to do. Agent Rodriguez was unable to provide any examples of Agents leaving their shifts early, other than his first hand examples

from over a year ago when he left his shift early. Based on interviews conducted at the Laredo North Station of both journeyman level Agents and supervisors, it seems unlikely that Agents routinely leave their shifts early. Surveillance conducted of the Laredo North Station appeared to indicate that Agents were waiting to be relieved by the oncoming shift before returning to the Laredo North Station.

Allegation 4: Rampant abuse of AUO

The evidence does not support the allegation of rampant AUO abuse by Agents assigned to the Laredo North Station. [5 U.S.C. § 5545(c)(2).] Based on surveillance conducted during the week of September 10, 2012, there does not appear to be rampant abuse of the AUO pay system at the Laredo North Station. The results of surveillance conducted on the alleged five worst abusers of AUO covered 38 hours of claimed AUO and revealed that Agents worked an average of 57 minutes for every hour of AUO they claimed. Agents who participated in the voluntary interviews did not believe there was abuse of the AUO pay system. The Agent's responses were consistent in their understanding of the AUO policy; stating they are told constantly by their supervisors to "Claim what you work and work what you claim."

Although only the departure times of the alleged five worst abusers of AUO were officially recorded, CBP-IA Special Agents had a good vantage point of the Laredo North Station and observed all Agents as they came and went from work. In general, Agents could clearly be seen arriving for work 10-15 minutes early, and following muster, Agents were observed driving their service vehicles to their POV to transfer their equipment for the day, and then leaving to relieve the outgoing shift. It took approximately ½ hour before Agents left to relieve the outgoing shift, and approximately ½ hour later Agents from the field began arriving at the station and could be seen transferring their equipment to their POV.

CBP-IA Special Agents also observed that traffic appeared to play a role in the time it took Agents to return from the field. There was virtually no traffic between midnight and 2 AM and significant traffic between 8-10 AM. A difference in the traffic congestion is a possible explanation for why Agents returning to the station from the field after midnight typically arrive earlier than Agents returning in the morning rush hours.

V. DESCRIPTION OF ACTION TAKEN OR PLANNED

No evidence of any violation of law, rule, or regulation has been found; therefore, no administrative action will occur.