



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

Commissioner

Carolyn N. Lerner
Special Counsel
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 enclosed supplemental 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), U.S. Border Patrol (BP), Laredo North Station in Laredo, Texas 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 CBP employee Border Patrol Agent Miska Rodriguez who consented to the release of his name. Through a message to CBP's Office of Chief Counsel, OSC requested a supplement investigation regarding misuse of administratively uncontrolled overtime (AUO) at the Laredo North Station. Once notification was received and acknowledged, the matter was referred to the CBP Office of Internal Affairs for investigation on October 22, 2013. 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 included in the enclosed report.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "T. S. Winkowski".

Thomas S. Winkowski
Acting Commissioner

Enclosure

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

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

Original Basis for the Investigation

Border Patrol Agent (BPA) 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. BPA Rodriguez, who works at the Laredo North Station, specifically alleged that BPAs 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 by claiming overtime for work that was not performed.

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 (CBP-IA), for investigation.

On August 22, 2012, CBP-IA interviewed BPA Rodriguez and obtained additional information related to his specific allegations. CBP-IA completed an investigation of these specific allegations on September 27, 2012, and found no evidence of any violation of law, rule, or regulation or substantial and specific danger to the public safety related to BPA Rodriguez's allegations. Specifically, CBP-IA found no evidence to support BPA Rodriguez's allegations that Agents were regularly leaving their assigned zones prior to be relieved by the oncoming shift, and later claiming overtime work the duties they were not physically present to complete.

Basis for the Supplemental Investigation

On October 22, 2013, OSC requested a supplemental investigation from CBP-IA regarding the misuse of Administratively Uncontrollable Overtime (AUO) at Laredo Station North based on their review of CBP-IA's initial report, further discussions with BPA Rodriguez and information OSC has learned pursuant to five other pending cases on the misuse of AUO. Specifically, OSC alleged "that Agents at the Laredo North Station are earning AUO pay by remaining at their duty stations two hours beyond the end of their regularly scheduled shift on a daily basis," and "that Agents are frequently engaged in routine post-shift activities during those two hours, which is not activity that justifies the receipt of AUO pay."

OSC recommended "the investigation should include, at a minimum, a review of time and attendance records for a random sample of employees to determine whether AUO has been/is being claimed on a regular and consistent basis, and to determine what activities are being performed to justify AUO pay. In addition, interviews of supervisors and additional Agents should be conducted to determine whether Agents are regularly remaining at their duty stations two hours beyond the end of their regularly scheduled shift in order to earn AUO pay, and what activities the Agents are performing to justify receipt of AUO pay."

In addition, BPA Rodriguez had previously informed investigators that Patrol Agent in Charge (PAIC) Hector Escamilla told employees that they could exercise during the last half-hour of the two-hour period claimed as AUO. OSC requested that CBP-IA investigate this allegation which was not specifically addressed in the original report provided to OSC.

II. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

Supplemental Allegations investigated

Based on the additional information and guidance provided by OSC, the following supplemental allegations were investigated:

Allegation 1: BPAs at the Laredo North Station are frequently engaged in routine post-shift activities for which they claim AUO.

Allegation 2: BPAs at the Laredo North Station are regularly remaining at their duty stations two hours beyond the end of their regularly scheduled shift in order to earn AUO pay.

Allegation 3: BPAs at the Laredo North Station are not performing duties that justify the receipt of AUO pay.

Allegation 4: PAIC Hector Escamilla told Agents that they could exercise during the last half-hour of the two-hour period claimed as AUO.

Review of Time and Attendance Records

CBP-IA Management Inspection Division (MID) analyzed time and attendance records utilizing the CBP Overtime Scheduling System (COSS) for 70 BPAs, selected at random, who were assigned at the Laredo North Station during the years 2010, 2011, and 2012. Over 50,000 individual records were reviewed and analyzed for when during the shift AUO was claimed, how often two hours of AUO were claimed per day, and how often AUO was claimed in 30 minute and 15 minute increments versus whole hour increments.

CBP-IA MID also reviewed Forms G-1012 which documents the "reason for AUO hours worked." Laredo North Station did not require BPAs to use the Form G-1012 prior to December 2012, and therefore there are no records documenting the reason why AUO was required for the years 2010, 2011, and 2012. CBP-IA MID reviewed the Forms G-1012 for 2013 and this report provides a summary of the reasons used from those forms to justify the need for AUO hours worked.

Interview of Border Patrol Agents, Supervisors and Senior Managers

From the list of 70 BPAs whose time and attendance records were randomly selected for review and analysis by CBP-IA MID, a smaller random sampling was interviewed to determine what duties they typically perform during the AUO hours they claimed, whether or not they considered these duties to be "routine post-shift activities," and additional questions to determine their understanding of AUO. Senior BPA Managers were interviewed and provided an opportunity to comment on the results of CBP-IA's analysis of time and attendance records and the results of interviews conducted with their subordinates. Senior BPA Managers were also provided the opportunity to comment on the impact to Border Security and the financial impact that would result if AUO was unavailable for use at Laredo North Station.

The following employees were interviewed and provided a sworn written affidavit:

- Sector Division Chief (Operations) Roberto Santos, Sector Headquarters, Laredo Sector
- Patrol Agent in Charge (PAIC) Carl Landrum, Laredo Station North, Laredo Sector
- Patrol Agent in Charge (PAIC) Hector Escamilla, Weslaco Station, Rio Grande Valley Sector
- Special Operations Supervisor (SOS) Victor Cardenas, Laredo Station North, Laredo Sector
- Special Operations Supervisor (SOS) David Salinas, Laredo Station North, Laredo Sector
- Supervisory Border Patrol Agent (SBPA) Alejandro Ali, Laredo Station North, Laredo Sector
- Supervisory Border Patrol Agent (SBPA) Modesto Green, Laredo Station North, Laredo Sector
- Supervisory Border Patrol Agent (SBPA) Juan Navarro, Laredo Station North, Laredo Sector
- Supervisory Border Patrol Agent (SBPA) Rodolfo Urbina, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Jorge Baltazar, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Ronald Mauldin, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Stephen Gampp, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Adam Smith, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) David Castaneda, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Angelo Velastegui, Laredo Station North, Laredo Sector
- Border Patrol Agent (BPA) Brenda Alvarado, Laredo Station North, Laredo Sector

Allegation regarding PAIC Hector Escamilla

PAIC Hector Escamilla was interviewed regarding the allegation that he told BPAs they could exercise during the last half-hour of the two-hour period claimed as AUO. Additionally, the BPAs and Supervisors who previously worked for PAIC Hector Escamilla were interviewed and asked if they recalled any time when they were told it was permissible to work out during AUO.

III. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION

Relevant Regulations

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

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

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

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

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

Memorandums from U.S. Border Patrol Chiefs

On January 14, 2008, U.S. Border Patrol Chief David Aguilar provided overtime guidance via memorandum titled *Use of Administratively Uncontrollable Overtime (AUO) at Checkpoints*. In his memorandum, Chief Aguilar specified that “it appears managers have used AUO to compensate employees who provide coverage for routine gaps in shift changes... 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.”

Chief Aguilar’s memorandum also reiterated the guidance provided in 5 C.F.R. Sec. 550.153, and specifies that “continuation of duties’ does not include administratively controllable situations such as when an employee must routinely continue working because of the nature of the shift assignments,” and “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.”

On June 14, 2010, U.S. Border Patrol Chief Michael Fisher reiterated the guidance provided by Chief Aguilar via memorandum titled *Use of Administratively Uncontrollable Overtime at Border Patrol Checkpoints*. In his memorandum, Chief Fisher specified that “Chief Patrol Agents are reminded that the use of Administratively Uncontrollable Overtime (AUO) is not appropriate compensation for work that may be regularly anticipated and scheduled in advance, particularly at checkpoints.”

On December 10, 2012, U.S. Border Patrol Chief Michael Fisher provided overtime guidance via memorandum titled *Administratively Uncontrollable Overtime Guidance*. In his memorandum, Chief Fisher reiterated the guidance provided in 5 C.F.R. Sec. 550.153, and specified that AUO is only authorized when (in addition to other criteria) “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).” Chief Fisher also specifies in his memorandum that “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.”

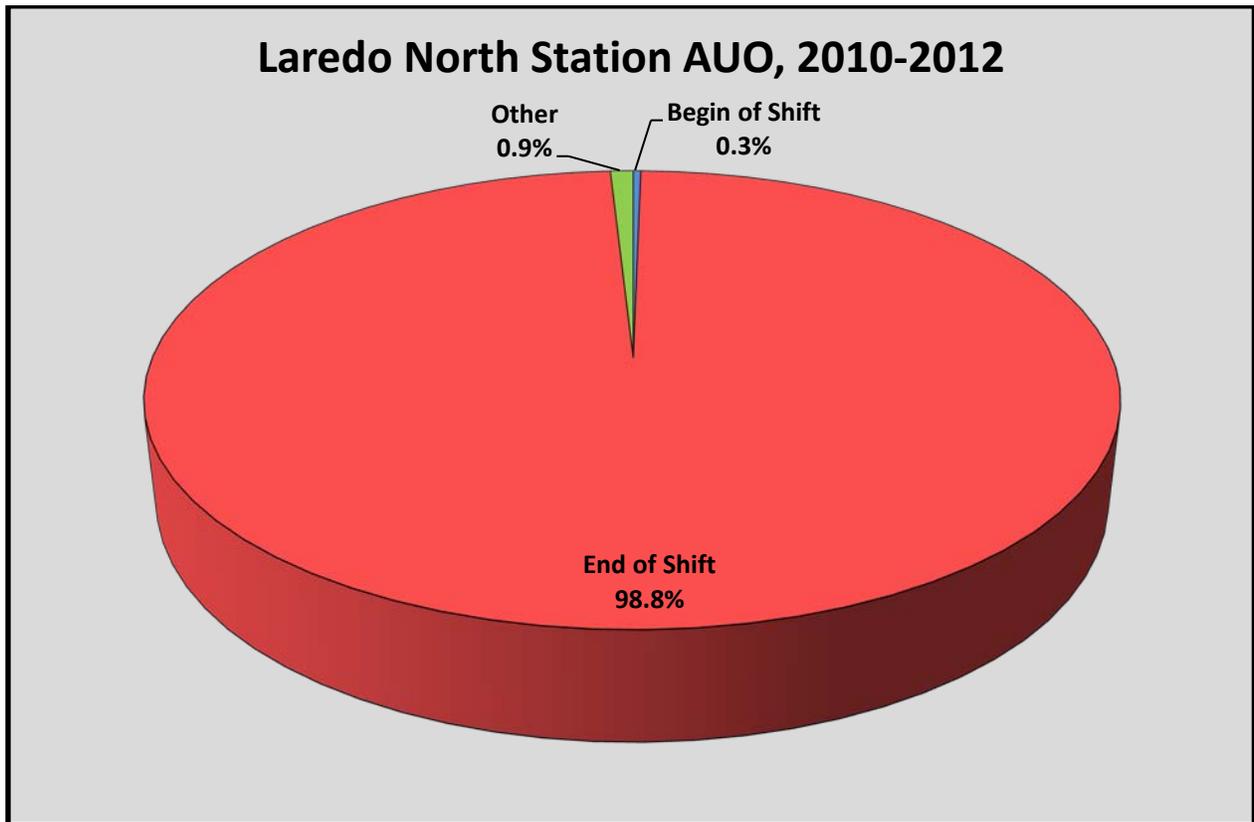
Chief Fisher also states in his memorandum to “Claim AUO in quarter-hour increments,” and “Rounding up, breaking the half hour to claim one hour, automatic “twos,” and pre-scheduling of AUO is prohibited by law.”

Review of Time and Attendance Records (COSS)

A review by CBP-IA MID of time and attendance records from 2010 through 2012, for 70 randomly selected BPAs at the Laredo North Station indicated approximately 98.8% of AUO was claimed immediately following the scheduled shift. Refer to **Pie Chart 1** below which shows a graphical representation of when the AUO was claimed in reference to the scheduled shift worked.

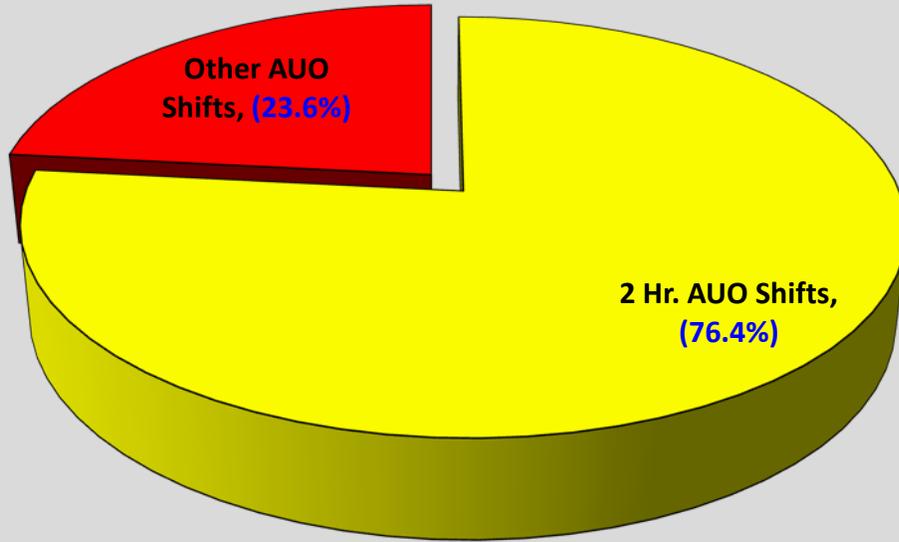
A review of time and attendance records from 2010 through 2012, for 70 randomly selected BPAs at the Laredo North Station indicated that 2 hours of AUO was claimed on a regular and consistent basis, approximately 76.4% of the time. Refer to **Pie Chart 2** below which shows a graphical representation of how often 2 hours of AUO was claimed during a scheduled shift.

A review of time and attendance records from 2010 through 2012, for 70 randomly selected BPAs at the Laredo North Station indicated approximately 99.6% of AUO was claimed in whole hour increments and not in quarter hours increments; giving an appearance the AUO hours are rounded to the nearest whole hour. Refer to **Pie Chart 3** below which shows a graphical representation of how often AUO was claimed in whole hour increments.



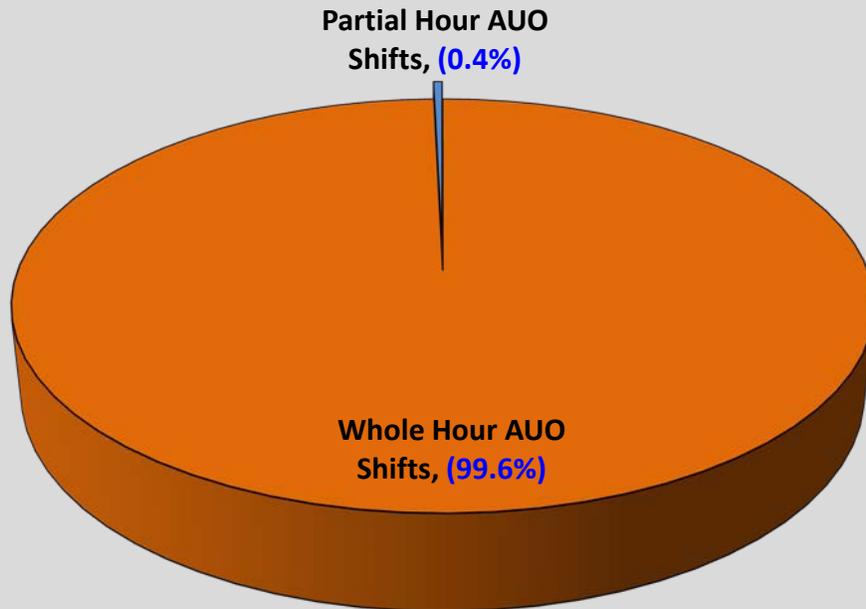
Pie Chart 1: Percentage of when AUO was claimed

Laredo North Station AUO, 2010-2012



Pie Chart 2: Percentage of when 2 hours of AUO was claimed

Laredo North Station AUO, 2010-2012



Pie Chart 3: Percentage of when AUO was claimed in whole hours

Reasons provided for AUO hours worked

The following sample quotes are taken directly from the Forms G-1012, “reason for AUO hours worked” for the 70 randomly selected BPAs at Laredo North Station:

SIP, Waiting on agents, missing equip.	Organizing shift reassignment
AAR	Packing radios
Administrative duties	Parts issues at sector
Admin STC/ Reporting	PAT course marking & facility procurement
Armory, waiting on agents, & inventory	Picking up parts
Attending funeral, public relations	Prep for training
Awaiting Relief, Vehicle Maintenance	Property / Assets Relocation, inventory, account issues
BPETS Project	Protecting America from alien/narcotic smugglers
Camera Duties / monitor, waiting for relief	Protecting America from terrorists and terrorist weapons
Case Preparation	Protecting our borders from aliens/narcotic smugglers
Class Prep	Protecting our borders from terrorist weapons
Contact with offsite vendor	Records Check
Database inputting and maintaining records of aliens	Re-installing radios
Desk duties various / Issuing I-44, answering phones	Report writing
End of month reports	South Texas Campaign Duties
End of shift Equipment Accountability	Sup Duties / Admin, COSS, Meetings
Firearms Quals	Testifying in Court
Fleet tasks / vehicle repairs, maintenance, accountability	Trailing, post checks
Fueling, post checks	Training / various - RAD Seeker, ATV, LPR, K-9,
Generating Reports	Training / various - Scoop truck, Academy
Getting receipts from vendor	Training /various - FTO Instructor Training, VLC courses
Honor Guard-various events	Training/ various - TAG, Evals, Class Prep, Fraud Docs,
Hospital Watch	Training / Finals, Practical, Preparing for MODs
Intel Development, Target Analysis	VACIS report
Liaison Duties	VIP tour
Logistic plan development	Waiting for agent to come in from field
Maintaining I-44 abd G-166 logs	Washing bays
Managing Sector qualifications	Working on background investigation
Meeting	Writing memos

Interview of Border Patrol Agents and Supervisors

During interviews, all but one of the BPAs and supervisors described the duties they typically perform during AUO, as duties that are consistent with facilitating a transition between the three regularly scheduled shifts per day. The examples that BPAs provided include continuation of patrol duties while awaiting shift relief, checking-in equipment, and administrative reports. Some BPAs and supervisors offered that shift change could be performed without AUO if they utilized four shifts per day (versus three shifts per day). BPAs recalled previously trying four shifts per day, and one supervisor recalled: “for a few months we moved to four shifts per day but the manpower on the border was significantly reduced and

spread too thin and there wasn't enough Patrol Agents per shift to effectively respond to all incursions and traffic."

One hundred percent of BPAs interviewed stated that they knew AUO could be claimed in 15 minute increments. The employees interviewed claimed 2 hours of AUO during the majority of the days they were on duty and they were all asked: "Do you work two hours of AUO every time at the end of your shift?" The response from one employee was fairly typical of the answers given: "No, sometimes I work more than two hours, but I normally only claim two hours. It's frowned upon to routinely claim more than two hours of AUO, for uniformity reasons. I also come in a half hour early every day to prepare for the shift, but I never claim AUO before the shift." The BPAs interviewed believed that AUO could only be claimed at the end of their shift, and in some instances if they were called in to respond to an emergency after hours they would either claim those hours at the end of their shift the next day, or in some cases they would never claim those hours that were worked.

BPAs and supervisors were also asked based on their knowledge "was the way Patrol Agents claim AUO the same at other stations as it was at Laredo North Station?" One hundred percent of the BPAs interviewed who had worked at another station in their recent career all responded that AUO was treated the same way at the other stations where they had been assigned and that Laredo North Station was not managing AUO any differently.

Interview of Border Patrol Senior Managers

Senior BPA Managers were asked: "Has there ever been discussions about utilizing a four shift per day schedule instead of the current three shifts per day schedule, and if so, what decisions were made?"

PAIC Carl Landrum, who took command of Laredo North Station on September 27, 2012, stated: "Yes, it was discussed in February 2013 under my command at the Laredo North Station. It was determined that it would result in a reduced enforcement footprint to 52% of our current capability. Furthermore, national security of our country would suffer greatly. Gaps in coverage are already exploited by transnational criminal organizations (TCO) and the illicit networks supporting them." It was determined by Senior BPA Management at that time to remain on a three shifts per day schedule.

Sector Division Chief Roberto Santos stated: "Laredo Sector has tried a four shift rotation, but then one station at a time went back to a standard three shift rotation (clean shift) with an early shift which in essence turned into six shifts. Four shifts rotation costs more in regards to premium pay because of the "double Sunday" pay since there is an overlap."

Senior BPA Managers reviewed the list of "Reasons for AUO hours worked" taken from the Forms G-1012 of the 70 randomly selected BPAs at Laredo North Station, and asked if they believed the reasons listed were certifiable for purposes of AUO pay.

PAIC Landrum responded by saying: "AUO certifications are not based on the reason provided on a form, but rather by the actual work completed. I believe that many agents lack initiative to articulate their activities precisely, and tend to use generic descriptions. It is not that they are engaged in unauthorized activity; rather they do not understand the importance of a thorough and detailed accounting that ensures alignment with the legislation. For instance, when agents indicate that they are "waiting for relief," I believe they are actually anticipating an awaited event to occur in the area of responsibility for which they have a duty to monitor and secure to provide national security to our nation. They are in fact not simply waiting for relief, but rather continuing their duties beyond their scheduled tour of duty for compelling

reasons related to the activity and behavior of criminals or suspected criminals. These awaited criminal events dictate that the employee remain after normal working hours. Compelling reasons may be maintaining surveillance, following up leads, responding to electronic sensor alarms, aircraft or unmanned aircraft system sightings, interpreting and following footprints and other sign, administrative and criminal case processing of aliens, human and narcotic smugglers, contraband seizures, and vehicles seizures to name a few. Continuance of surveillance includes static surveillance to deter and prevent the surreptitious border crossing of an individual, group, or contraband observed in Mexico near the international boundary that is anticipated to make an illegal entry if the agent leaves the area. The transnational criminal organizations and the illicit networks supporting their organized criminal enterprise conduct counter surveillance of border patrol activities on an ongoing and continuous basis. As soon as TCOs identify a window or opportunity, it is likely that an immediate criminal event will occur.”

Sector Division Chief Roberto Santos responded: “The reasons listed on the G-1012 Form are not an accurate representation of what the Patrol Agents do during their AUO time. There is not enough space on the form to accurately capture all the many duties they perform, so the Patrol Agents put down one of the many things they do instead of listing the myriad of duties they perform. It may only take ten minutes to turn in their equipment, but there is not space on the form to put more than that, even though they are processing smuggling cases. Those Patrol Agents who put “Protecting America” believe that is a better representation of what they do on their AUO time that encompasses all of the many duties they perform. When a Patrol Agent uses the term “Administrative Duties” he normally means filling out time sensitive paperwork that is required as part of a prosecution smuggling case. The U.S. Court system requires that smuggling cases be processed within 48 hours for the initial appearance at Magistrate Court.”

Senior BPA Managers agreed that without the use of AUO, the cost to maintain the same level of security along the Border would increase substantially. PAIC Landrum summed it up by stating: “To make up the loss of almost 50% of our enforcement footprint and on a rough order of magnitude, without the use of AUO it would cost approximately \$45M annually, which is approximately \$15M increase over current salary expenditures.” PAIC Landrum also stated: “The effect on border security, and thereby national security, would be detrimental. Operations would only be able to provide coverage to approximately 52% of the areas covered with the use of AUO. Transnational criminal organizations (TCO) and their illicit networks would likely [grow in strength and capability].”

PAIC Landrum also added: “I believe that the five decades old AUO legislation has been lingering through a period of strategic drift. The legislation should be updated by Congress. I support Border Patrol pay reform as currently proposed in Congress. AUO was originally designed in a vastly different era for an organization that has evolved greatly since that time, especially in light of our anti-terrorism mission. Agents take their sworn duty to country very seriously. Agents provide national security to our country and its citizens, but Agents’ efforts do not stop there. The work of all employees in the U.S. Border Patrol contributes to continental, hemispheric, and global security as well. This sworn duty and the requirements thereof provide for America’s way of life as we know it. The geopolitical nature of our mission is difficult to navigate at times, but the stability border security provides for our country is paramount to the stability throughout the western hemisphere and rest of the world.”

Allegation regarding PAIC Hector Escamilla

During the timeframe (2010-2012) that BPA Rodriguez alleged that PAIC Hector Escamilla “told employees that they could exercise during the last half-hour of the two-hour period claimed as AUO,” bargaining unit employees were not approved to exercise on duty. At the time, there was a pilot program

that allowed Supervisors to exercise on duty, but the program had not yet been approved for bargaining unit employees.

PAIC Hector Escamilla stated that he had “no recollection of having a conversation with Agent Rodriguez regarding working out on AUO. Furthermore, Agent Rodriguez was a bargaining unit employee if I recall correctly, so he was not even entitled to work out on duty... Nonetheless, it would not be in my nature to approve AUO in a manner inconsistent with policy.” PAIC Escamilla also denied having any such conversation with any Agent, and stated that he has “never personally approved any agent working out on AUO.”

All the BPAs interviewed for this investigation were asked if they had ever been told by PAIC Escamilla or any other supervisor that they could work out on AUO time. All of the BPAs interviewed denied ever being told by PAIC Escamilla, or any other supervisor, that they were allowed to work out on AUO time. They were also aware that no pilot program existed for bargaining unit employees to exercise on duty from 2010-2012, and that only recently were bargaining unit employees allowed to participate in an exercise program while on duty. All BPAs interviewed were aware that to participate in the pilot program they could not exercise during the first or last hour of their shift, and they could not claim AUO for working out.

All the BPAs interviewed were adamant that PAIC Escamilla would never have said anything about employees being able to work out on AUO, and one supervisor summarized by saying: “I attended meetings with PAIC Escamilla every Monday and sometimes discussed AUO, but he would never say anything so ridiculous.”

IV. INVESTIGATIVE FINDINGS

Allegation 1: Border Patrol Agents at the Laredo North Station are frequently engaged in routine post-shift activities for which they claim AUO.

The evidence supports the allegation that BPAs are frequently engaged in routine post-shift activities for which they claim AUO. Information gathered from formal and informal interviews indicated that the Agents interviewed believe that would not be possible to complete their core mission using a schedule that utilizes three shifts per day, without the use of additional hours to facilitate routine shift change. BPAs and supervisors who were interviewed consider the majority of their work during AUO to be routine post-shift activities and readily admit “they are duties that need to be performed every day to complete the shift.”

Allegation 2: Border Patrol Agents at the Laredo North Station are regularly remaining at their duty stations two hours beyond the end of their regularly scheduled shift in order to earn AUO pay.

The evidence supports the allegation that BPAs are regularly remaining at their duty stations two hours beyond the end of their shift in order to earn AUO pay. However, many Agents interviewed claim the duties they are mandated to perform at the end of their shift duties BPAs are mandated to perform at the end of their shift to maintain border security, require the BPAs to remain on duty approximately two extra hours per day, to facilitate shift changes. Based on the interviews conducted, some BPAs claim to work more than two hours of AUO per shift, but only claim two hours on time and attendance records.

As an example, during shift change the oncoming BPA must attend muster for approximately 10-15 minutes. Afterwards, the BPA will check-out his equipment, approximately 10-15 minutes, such as Night Vision Goggles (NGV), rifles, sensor books, and government owned vehicle (GOV). The BPA must

inspect his GOV for damage or discrepancies, fuel, etc. and transfer his personal gear from his privately owned vehicle (POV) to his GOV, another 10-15 minutes. The BPA then drives to his duty location and relieves the BPA going off-duty, approximately 15-30 minutes. The BPAs perform a quick briefing so the oncoming BPA is aware of what activity has occurred during the prior shift, 5-15 minutes. The BPA going off duty must travel back to the station, 15-30 minutes, fuel and clean his GOV, 10-15 minutes, turn in his equipment, 10-15 minutes, and complete the required administrative paperwork for his shift, 10-30 minutes. Based on this example, on a routine day, a BPA may have to work an additional two hours, sometimes longer, to complete his shift.

Allegation 3: Border Patrol Agents at the Laredo North Station are not performing duties that justify the receipt of AUO pay.

The evidence supports the allegation that BPAs are not performing duties that justify the receipt of AUO pay. Although there are certainly many instances when BPAs apprehend illegal aliens near the end of their shift and must continue on duty to transport and process those illegal aliens, in general, the majority of the duties performed by BPAs claiming AUO are routine post-shift activities. Based on 5 C.F.R. Sec. 550.153, and the numerous memorandums from the U.S. Border Patrol Chief, routine post-shift activities are not duties that justify the receipt of AUO pay.

Senior BPA Managers admit that four shifts per day have been tried in the past, and discussed as recently as February 2013, and the choice was deliberately made to continue with three shifts per day utilizing AUO to facilitate the shift changes. Senior BPA Managers explain the reason for these decisions was a lack of manpower to appropriately patrol and secure the border utilizing four shifts. By definition, if the hours of duty can be controlled administratively by “hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required,” then they do not qualify for AUO pay. Based on the statements made by Senior BPA Managers, rescheduling the hours of duty (to four shifts) and hiring additional personnel would enable the Border Patrol to sufficiently secure the Border without the use of AUO to facilitate shift change.

According to PAIC Landrum, transitioning Laredo North Station to four shifts per day without AUO would reduce the enforcement footprint by approximately 48%. The Laredo North Station would effectively have to double their personnel in order to maintain the same patrol coverage on the border. Using financial calculations provided by PAIC Landrum, salary expenditures for Laredo North Station in 2013 were approximately \$32 million. To maintain the same patrol coverage with additional personnel and no AUO would cost approximately \$45 million per year, an increase of \$13 million in cost for Laredo North Station alone.

Allegation 4: PAIC Hector Escamilla told Agents that they could exercise during the last half-hour of the two-hour period claimed as AUO.

The evidence does not support the allegation that PAIC Hector Escamilla told BPAs that they could exercise during the last half-hour of the two-hour period claimed as AUO. During the timeframe (2010-2012) that BPA Rodriguez made his allegations, bargaining unit employees were not approved to exercise on duty. At the time there was a pilot program that allowed supervisors to exercise on duty, but the program had not yet been approved for bargaining unit employees.

The BPAs interviewed were very clear in their understanding of the current program that allows them to exercise while on duty, and they all knew that AUO could not be claimed for working out, and not one

BPA interviewed gave any indication that any supervisor had ever said they could work out during AUO time. Most BPAs indicated there was not enough time to work out after their shift was over.

V. DESCRIPTION OF ACTION TAKEN OR PLANNED

CBP intends to take the following actions:

- Regarding Border Patrol Agents stationed at Laredo North Station, because their functions are directly operational and can encompass job duties that are legitimately eligible for AUO, a blanket deauthorization from AUO would be potentially overbroad and infeasible. Nevertheless, based on the results of the IA investigation, it is clear that AUO is being inadequately documented and/or utilized improperly for work that is not compensable under AUO. As a consequence, CBP will expeditiously implement an AUO compliance validation of claims for AUO at the Laredo North Station for 30 days. AUO claims will be contemporaneously reviewed by the IA Management Inspections Division (MID) for independent verification that the hours claimed are valid and in compliance with current requirements for compensation under AUO, and MID will inform OBP management of instances that do not meet AUO requirements prior to supervisory approval. Any work performed that is not compensable under AUO will instead be compensated under the applicable appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward. Following this 30 day initial review, MID and OBP will conduct a statistically valid sampling review on a biweekly pay period basis to ensure ongoing compliance. Following satisfactory compliance of the biweekly reviews over a 60-day period, the review approach will be changed to a random statistical sampling on a quarterly basis. Contemporaneous with these three phases of review, and based on the findings of these reviews, OBP will be implementing a new framework for documenting all AUO claims in addition to instituting new management controls for its certification at the Laredo North Station.
- Once the new framework and associated oversight mechanisms are successfully in place at the Laredo North Station, OBP and MID will implement these actions at all Border Patrol Sectors to organizationally align AUO best management practices and procedures nationwide.
- In addition to the compliance validations at Laredo North Station, CBP will also engage in similar prospective, independent review of AUO administration CBP-wide to verify that claimed AUO hours are in fact compensable as AUO. The reviewing entity will report findings and make recommendations to CBP senior leadership for appropriate action.
- CBP will act upon the findings of the internal eligibility review currently being conducted by the CBP Office of Human Resources Management (HRM) to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified. The HRM review will be completed by February 15, 2014.
- Issue a revised AUO directive after the department-wide AUO review and in concert with Immigration and Customs Enforcement's own directive.
- CBP is cooperating fully with a recently initiated department-wide audit of AUO use at DHS being conducted by the Government Accountability Office.
- CBP is continuing to explore the possibility, through legislation, of comprehensive pay reform for Border Patrol Agents and other job categories earning AUO.