

U.S. OFFICE OF
SPECIAL COUNSEL
WASHINGTON, D.C.

December 23, 2012

2012 DEC 28 PM 2:57

Johanna Oliver, Attorney
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

RE: OSC File No. DI-12-1105

Dear Attorney Johanna Oliver:

Upon receipt of the report from the investigating agency, I became shocked by the lack of findings regarding my allegations against LRN/LRT (Laredo North Border Patrol Station, Laredo Sector, Laredo, TX). Nevertheless, I remain steadfast in my belief, assertions, and allegations. My belief and knowledge of these allegations are all first hand and of personal knowledge. All my allegations are true and correct.

In the report, it is stated that the investigator looked at CBP Form G-481, but he did so only for the month of August 2012. On my report to the OSC, I stated that my observations took place throughout a number of years, from 2010-2012, and not just for the year of 2012. The investigation was short in nature, not enough agents were interviewed, and it was conducted in haste. According to the report, only five agents, out of more than 500, were followed regarding AUO and only ten agents were interviewed regarding the border being unsecured.

Regarding the statements made by DPAIC Manuel Martinez, I can for sure attest to the fact that the SIG did not exist in 2010 or 2011; the SIG (Smuggling Interdiction Group) is a new group which was formed in 2012 by PAIC (Patrol Agent in Charge) Oscar Maldonado. The SIG was called Disrupt previously to being expanded and given the name of SIG. However, Disrupt never worked the Uppers or Mines Road, which is the adjacent road to the Uppers and the border. To the best of my knowledge, The Disrupt Unit worked the highways, downtown Laredo, TX, as well as Special Operations such as "Mind Your Own Business" which was an operation that dealt with businesses that were aiding or harboring aliens. Regarding SOG, it is entirely not true that we were never told when they went out there to the Uppers. In fact, to the contrary, on numerous occasions we were told in muster, and I quote, "stay in the hard top because SOG is conducting an operation in the Uppers." The hard top is Mines Road in this case, a road along the border and next to ranches that nexus the river. It is also not true that the Uppers were always properly manned because on one particular night, for example, I was the only agent in the entire area from La Bota Ranch to the Needmore Ranch, an area encompassing more than 20 miles in length, and I heard nothing on the radio regarding SOG or SIG being present, nor did I see them during my patrols that night in March or April 2012. Also, it is entirely not true that the Uppers were staffed with SIG and SOG or BORTAC everyday during 2010 and 2011. It may have been true during the months between April and November 2012, but it was not so before during the aforementioned years.

Perhaps, the Internal Affairs Investigator could not find anything because I alerted PAIC Oscar Maldonado in April 2012 that I had written to the IG. A mistake on my part, however, the IA investigator did not go back far enough in his investigation. He did not go the extra mile in this investigation. For example, he did not look at the evidence from 2010 and 2011, which is where most of the offenses I am aware of occurred. He may have not interviewed the agents under oath, and he may have not interviewed the agents I suggested he interview. He may have not questioned the fact that the Laredo Processing Center only began in 2012. The processing center was established by PAIC Maldonado in January of 2012. There was no processing team or center during 2010 and 2011, even though I constantly asked supervisors to please give us a processing team so we would not have to abandon our areas of responsibility in order to come in and process aliens, therefore leaving the border unsecured. And, why wasn't the name of SBPA Guillermo Jimenez ever mentioned in the report? SBPA Jimenez gave me and BPA Aaron Reed a direct order not to return to our assigned area in Zone 17. This occurred on, or about, 10 PM on Dec 30, 2011. I provided that report to the investigator, however, he may have forgotten about it or completely ignored it, or something happened that this particular failure in leadership was not included in the report or addressed during the investigation.

In regards to the allegation of AUO abuse, for example, the name of PAIC Hector Escamilla never was mentioned in the report. I advised the investigator, and I believe also your office, that sometime in 2011, PAIC Hector Escamilla said in muster, a few days after BPA Michael Miller suffered an injury at the hands of an alien who assaulted him, and I quote Mr. Escamilla, "that we could use the last half-hour of AUO to workout because that could mean, perhaps, life or death," [paraphrased.] Although very generous on his part, that is not what policy allows, see memo from Chief Fisher dated DEC 10, 2012, page 2, under the heading "claim AUO in quarter-hour increments." So, if we are supposed to claim AUO in quarter-hour increments, why was almost everybody, with the exception of a few agents and the management, claiming two hours of AUO when they only worked 1 hour and 35 minutes, or sometimes even just 1-½ hours? Almost everybody at LRN was a worst offender and not just the five examples I gave the investigator. But, to be fair to the agents, it must be said that there was a systemic failure and a failure in leadership that allowed that kind behavior. That was what everybody did during my entire time at LRN between 2009 and April of 2012, work 1-½ hour and claim 2 full hours of AUO worked; and that, is the honest truth because we all did it, including myself. Working 1-½ hour and claiming 2 hours was sanctioned by the leadership, especially PAIC Hector Escamilla.

However, to be fair, I must say that the AUO problem has been solved since Chief Fischer issued a new memo regarding AUO. Now supervisors are tracking AUO worked by agents and agents have to write down what they worked and sign for it.

So, if AUO was not a problem before, why all of the sudden all this stringent measures to track AUO and hold people accountable came to life? It came to life because everybody knows in this station that there was AUO fraud, but no one came forward with honesty to say the truth. Perhaps, they may have been afraid of the leadership, or perhaps these

agents who were interviewed wanted to continue with the status quo because that represented 25% of their pay, approximately between \$15,000 and \$17,000 per year, depending on grade and years of service. No one wants to give up that kind of money without a fight if they can have a say in it. Chief Fischer's memo makes it clear how AUO is going to be worked and claimed. At least, progress was made in this front after the American people lost millions of dollars in fraudulent claims.

On the issue of agents leaving the Uppers before being properly relieved, I can say, unequivocally, that that did happen, and it happened in numerous occasions between the years of 2010 and 2012. When I was an intern, I was told by senior agents on numerous occasions to, and I quote, "let's take it in," however, most times it was just 8:00 AM and we had not been relieved by the oncoming shift, not by radio, or face-to-face. Between the time the new shift gets to the Uppers, after they go and get breakfast and buy water and whatnot, we would already be at the station and then and only then would we here something on the radio regarding relief. Furthermore, on numerous occasions we just left and the new shift did not even bother on making contact. All these things I saw, took part in them, and throughout the years, I became convinced that it was wrong, but I was afraid of becoming a target and that is why I did not come forward earlier. I am not afraid anymore. For two years I gave management the benefit of the doubt, thinking that one of them would come forward and make things right. But no, here most people only care about their jobs, their careers, and the big checks they get every two weeks; and that, is the cold truth regarding this station where a culture of laissez-faire prevailed.

On the subject of face-to-face relief, DPAIC Manuel Martinez stated that there is no policy regarding face-to-face relief at the Uppers. That is true; however, there is a policy of face-to-face relief at the Lowers. The Uppers has urban areas too, although is mostly rural, however, that does not justify leaving the border unsecured for 30 minutes to an hour during shift change and to bring agents to process aliens at the station. This lack of urgency regarding the Uppers, which by the way does have a lot of smuggling traffic, as you can see on the attached emails I received from Intel, represents a past lack of interest on the part of the leadership at LRN regarding these 20 to 25 miles of border. Currently that does not appear to be a problem anymore, as they are staffing the area adequately.

One recent accomplishment of LRN is the Sector Processing Center, which has improved things dramatically in the sense that we no longer have to abandon our assigned areas in order to bring aliens to the station to process them. Now when aliens are apprehended the transport team brings them from the border to the station to be processed by the processing team at the Laredo Sector Processing Center that was established in 2012. However, none of this occurred in 2010 and 2011, and there was no SIG, SOG, or BORTAC assigned to the Uppers on a daily basis, or even once a week. I remember SOG conducting operations in the Uppers from time to time, but certainly not everyday and not even every month during 2010 and 2011. The recalling of agents from the Uppers became so acute that we joked amongst each other about the fact that if you got assigned to patrol the Hog Farm or the Needmore, or the Uppers in general, you really were not going to patrol, you were going to go out there and two or three hours later you would be recalled

to process aliens. Every agent knows that that happened prior to 2012, but apparently, it was not asked, agents did not want to get involved, or they chose not to say what they know due to fear of retaliation from management. The agents at LRN are witnesses of what happened to me, and they are afraid they might end up just like me, on administrative duties waiting to be fired.

It would appear that DPAIC Manuel Martinez did not address the Uppers prior to 2012. Mr. Martinez focused his responses to include only successes that came about in 2012. However, I believe I told the investigator that these problems of AUO abuse and the Uppers being unsecured went back to my early days as an intern at LRN. I believe there was a breakdown in communication during this investigation. For example, I did not tell the investigator that agents should not be assigned to the checkpoint. The checkpoint is there to stay because the U.S. Supreme Court already ruled that "the immigration service may operate checkpoints within 100 air miles from the physical border of the United States for the purpose of conducting an immigration inspection." The court also ruled that "immigration checkpoints are not so intrusive and cumbersome as to justify their elimination and that they do not violate the 4th amendment," [paraphrased.] What I told the investigator was that between agents assigned to the checkpoint, the brush crew, K9, Marine Unit, and now the SIG, we have almost no one available to cover the Uppers. Mr. Maldonado expanded the Disrupt Unit by taking agents from the shifts, therefore leaving supervisors no other choice but to under staff the Uppers, which is an area management always neglected in the past and saw as low in priority. I believe the report from the agency indicates the leadership at LRN viewed the Uppers as a low priority area, see page 4 last paragraph. I would like to re-state that the SIG did not exist in 2010 and 2011. So, how is it possible for something that did not exist to cover the security of an area? It did NOT. Manuel Martinez misrepresented the facts here or he was not asked the proper questions. In addition, SOG did NOT cover the Uppers every day as DPAIC Martinez asserts. We were called in to process aliens almost on a daily basis, and I never saw or heard of SOG in our area. I was on the ground and had a radio capable of scanning all our frequencies. And I did not see SOG, nor hear them.

Last but not least, and regarding my philosophy about agents in the interior, I meant agents in interior stations such as Cotulla, TX. In closure, I would like to say that I remain steadfast and firm regarding my allegations. I reassert, at this time, all of my allegations as true and correct.

Sincerely,



Miska Rodriguez
Border Patrol Agent
Laredo North Border Patrol Station
Laredo, TX 78045
Miska.Rodriguez@cbp.dhs.gov

OBP 100/10.4.3-C



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

DEC 10 2012

MEMORANDUM FOR: All Chief Patrol Agents
All Division Chiefs

FROM: Michael J. Fisher
Chief
U.S. Border Patrol

A handwritten signature in black ink, appearing to read "Michael J. Fisher", written over the typed name.

SUBJECT: Administratively Uncontrollable Overtime Guidance

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, which is available at <https://cbpnetsecure.cbp.dhs.gov/sites/obp/Docs/HqPolicy/INS%20Administrative%20Manual%20-%20Procedures.pdf>.

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:

- 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.

Administratively Uncontrollable Overtime Guidance

Page 3

- 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.

References

- Title 5 United States Code Chapter 55
- Title 5 Code of Federal Regulations (CFR), Part 550 and 551
- Public Law 93-259, 93rd Congress S-2747, April 8, 1974, Fair Labor Standards Act
- Department of Justice Order Number 1551.4A
- Fair Labor Standards Act of 1938
- Immigration and Naturalization Service Administrative Manual, Section 1.3.103
- Immigration and Naturalization Service Administratively Uncontrollable Training Guide (1992)

Staff may address any questions or concerns to Assistant Chief Derek Boyle at (202) 344-1559 or Associate Chief Thomas Pocarobba of the Policy Branch at (202) 344-1401.

New hole on the fence

Mines Rd

Needmore main entrance

Google

© 2012 INECJ
© 2012 Google

at 27.695809° lon -99.717566° elev 493ft

1/20/2011 1995

