

U.S. Department of Homeland Security

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Washington, D.C. 20536



**U.S. Immigration
and Customs
Enforcement**

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

Re: OSC File No. DI-13-1556

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. Immigration and Customs Enforcement (ICE) Houston Field Office engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, or an abuse of authority. Specifically, the Office of Special Counsel (OSC) received allegations from an Immigration Enforcement Agent (IEA) stationed at ICE's Houston Field Office, stating that abuse of Administratively Uncontrollable Overtime (AUO) is pervasive within the Field Office. At OSC's request, ICE's Office of Professional Responsibility (OPR) conducted a supplemental investigation into the allegations. The findings are presented in the enclosed report, along with ICE's plan of action as a result of the investigatory findings.

Please do not hesitate to contact my office at 202-732-5307 should you require any further information regarding these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel H. Ragdale".

Daniel H. Ragdale
Deputy Director

Enclosure

Cc: Under Secretary for Management
Principal Deputy General Counsel

I. Summary of Information with Respect to Which the OPR Investigation was Initiated

On May 10, 2013, the U.S. Office of Special Counsel (OSC) provided a letter to Janet Napolitano, the former Secretary of the Department of Homeland Security (DHS), regarding allegations that the U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) Houston Field Office engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, or an abuse of authority. Specifically, Immigration Enforcement Agent (IEA) Tre Rebstock alleged that Houston Field Office management improperly and pervasively used Administratively Uncontrollable Overtime (AUO) to deny employees overtime pay rates. The OSC referred the information to ICE for an investigation of the allegations and requested a report of findings within 60 days.

On June 4, 2013, the ICE Office of Professional Responsibility (OPR) initiated the initial investigation into the allegation. As part of its investigation, OPR randomly selected and reviewed the time and attendance records for 28 Houston Field Office employees receiving AUO. OPR also reviewed a December 2012 inspection report prepared by the OPR Management Inspections Unit (MIU), which identified deficiencies relating to the Houston Field Office's administration of AUO. Specifically, the MIU report found that the required annual certifications for each employee receiving AUO were incomplete, and that the AUO justifications provided by employees were vague and did not suggest that the duties performed were administratively uncontrollable.

During its initial investigation in June 2013, OPR noted that on April 8, 2013, the Houston Field Office provided a written Corrective Action Plan (CAP) to MIU to address the pay compensation deficiencies identified in the December 2012 report. The CAP stated that the Houston Field Office addressed the first deficiency by having management review and sign all certification memoranda and spreadsheets associated with Houston Field Office employees receiving AUO, and would maintain copies in an AUO certification file. The CAP also stated that the second deficiency would be addressed by creating an AUO report and monitoring AUO accrued by each employee. The AUO report would be reviewed by the employee, the employee's immediate supervisor, and the respective time keeper on a quarterly basis. The Houston Field Office also requested that random audits be conducted on a monthly basis to ensure that the review process is maintained in all sub-office locations.

OPR determined that the allegation that management improperly and pervasively used AUO to deny employees overtime pay rates was unsubstantiated and closed the investigation on July 17, 2013. However, as part of its initial investigation into the allegation, OPR discovered that one employee of the 28 who were randomly sampled used questionable justifications for claiming AUO work. Additionally, the investigation determined that Houston Field Office employees' AUO justifications could be more defined as to the nature of the actual work being performed.

On November 13, 2013, OSC requested the time and attendance files for 10 of the 28 randomly selected Houston Field Office employees to further examine the AUO justifications provided. ICE provided the requested files to the OSC on December 13, 2013. After reviewing the files, the OSC telephonically requested that the agency conduct a supplemental investigation and provide a corrective action plan. In January 2014, OPR initiated

a supplemental investigation and audit regarding AUO administration at the Houston Field Office.

II. Description of Conduct of OPR's Investigation

In January 2014, MIU reviewed the "Record of AUO Hours Worked" forms for the 28 randomly selected Houston Field Office employees for each pay period from May 2012 through May 2013, a total of 29 pay periods. MIU created a spreadsheet for each employee, including the date of any claimed AUO (segmented by pay period); the total hours of AUO reflected; the verbatim description of duties provided by the employee, if any; and MIU's determination whether the description was sufficient, undetermined, or non-compliant with existing AUO policy.

If the description included legitimate duties justifying AUO (even if more detailed information may have been preferred), the description was deemed "sufficient." If the description was vague and it was unclear whether the duties warranted AUO, the reason was deemed "undetermined." If the description included duties considered administrative, regular, or otherwise inconsistent with the purpose of AUO, the description was deemed "non-compliant."

Additionally, OPR interviewed the Houston Field Office's Deputy Field Office Director (DFOD), as the Field Office Director (FOD) was unavailable due to medical leave. OPR also interviewed the Houston Field Office's Administrative Officer regarding the certification and approval of AUO justifications for employees assigned to the Houston Field Office. The scope of the interviews attempted to determine: 1) the current process related to the review and approval of AUO justifications performed at the Field Office level; 2) whether the Houston Field Office had issued local guidance regarding AUO justifications; and 3) whether ICE ERO Headquarters had issued guidance regarding AUO justifications.

III. Summary of Evidence Obtained from the OPR Investigation

A. Background Regarding ICE ERO and the Houston Field Office

ICE's Enforcement and Removal Operations (ERO) oversees programs and conducts operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove illegal aliens from the United States. ERO prioritizes the apprehension, arrest, and removal of convicted criminals, those who pose a threat to national security, fugitives, recent border entrants, and aliens who thwart immigration controls.

ERO manages all logistical aspects of the removal process, including domestic transportation, detention, alternatives to detention programs, bond management, and supervised release. In addition, ERO repatriates aliens ordered removed from the United States to more than 170 countries around the world.

ERO is comprised of seven headquarters divisions and 24 Field Offices, to include the Houston Field Office. The Houston Field Office is managed by a FOD, a DFOD, six Assistant Field Office Directors (AFOD), and 28 Supervisory Detention and Deportation Officers (SDDO), who oversee four sub-offices located in Huntsville, Texas; Livingston, Texas; Conroe, Texas; and a Contract Detention Facility (CDF) located in Houston, Texas. At the time that the random sample was conducted, the Houston Field Office staff consisted of 246 employees, including 91

Deportation Officers (DO) and 72 Immigration Enforcement Agents (IEA). Of the 246 staff members, 199 were certified for AUO.

As part of their assigned daily duties, DOs conduct legal research to support decisions on deportation/exclusion cases and assist attorneys in representing the government in immigration court actions. DOs work with other federal law enforcement officials to identify, locate, and arrest aliens and are responsible for ensuring the physical removal of aliens from the United States. Additional responsibilities include conducting complex investigations, conducting surveillance work, preparing investigative reports, and assisting in seizures.

IEAs are the uniformed presence of immigration enforcement within the U.S. interior. IEAs perform enforcement functions related to the investigation, identification, arrest, prosecution, detention, and deportation of aliens, and the apprehension of absconders from removal proceedings. IEAs assist in the processing and removal of aliens to their country of citizenship.

B. Current Process for Recording and Certifying AUO

Based on interviews conducted during the investigation, OPR determined that Houston Field Office employees who are certified for AUO submit a time sheet electronically to their first line supervisor, along with a hard copy of the "Record of AUO Hours Worked" form. The first line supervisor reviews the submission along with the corresponding AUO justifications and approves or denies the "Record of AUO Hours Worked" form. Once approved, the form is then submitted to the timekeeper for validation and submitted electronically to the ICE Office of Human Capital for payment.

C. Relevant Statutes and Regulations

Both 5 U.S.C. § 5545(c)(2) and 5 C.F.R. § 550.151 authorize 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) states 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(c) additionally states 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.”

D. Relevant Policies and Guidance

As with some other DHS components, ICE continues to reference guidance and policies from prior agencies that administered AUO (i.e., Immigration and Naturalization Service (INS) and/or U.S. Customs Service (USCS)).

The INS Administrative Manual (AM), Section 1.3.103 contains the following information regarding AUO:

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 INS AM also provides examples of incorrect applications of AUO. Examples of potential misuses include:

- (1) Payment of AUO 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;

The ICE Office of Human Capital has posted criteria for the applicability of AUO on the ICE employee website, which in part states:

The requirement that an employee must be required to perform “substantial amounts of irregular or occasional overtime work” involves the following elements:

- A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work;
- The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week; and
- There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the requirements of this Section.

The requirement that an employee is generally “responsible for recognizing, without supervision, circumstances which require him or her to remain on duty” means that:

- The responsibility for an employee to remain on duty when required by circumstances must be a definite, official, and special requirement of his or her position;
- The employee must remain on duty not merely because it is desirable but because of compelling reasons inherently related to continuance of his or her duties, and of such a nature that failure to carry on would constitute negligence; and
- 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.

The words “require the employee to remain on duty” mean that:

- The employee is required to continue on duty in continuation of a full daily tour of duty or, that after the end of the regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event (performance of only callback overtime work does not meet this requirement); and
- The employee has no choice as to when or where he or she may perform the work when he or she remains on duty in continuation of a full daily tour of duty. (This differs from a situation in which an employee has the option of taking work home or doing it at the office; or doing it in continuation of his or her regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in working hours, as when in a travel status, that he or she may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.)

In June 2007, the ICE ERO Assistant Director for Management sent a memorandum to all FODs requesting review of the general statutory and regulatory requirements pertaining to AUO to ensure its proper administration by supervisors.

On September 13, 2007, the Houston Field Office FOD sent a memorandum to all Houston Field Office employees, in an attempt to clarify eligibility for 1945 Act Overtime when officers are certified for AUO. The memo states the following:

Whenever possible, work for Federal employees must be scheduled on a regular basis, and AUO pay generally cannot be paid for work that has been regularly scheduled. Regularly scheduled work means that work that is scheduled in advance of an administrative workweek.

AUO pay is a substitute form of payment for irregular, unscheduled overtime work and is paid on an annual basis instead of on an hourly basis.

An AUO certified employee who is required to perform a call back assignment within the administrative workweek based on an unexpected or unscheduled event must claim AUO for overtime compensation.

Additionally, the Office of Personnel Management (OPM) has issued guidance¹ regarding AUO. The OPM Fact Sheet entitled “Guidance on Applying FLSA Overtime Provisions to Law Enforcement Employees Receiving Administratively Uncontrollable Overtime Pay,” found at <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/guidance-on-applying-flsa-overtime-provisions-to-law-enforcement-employees-receiving-administratively-uncontrollable-overtime-pay/> (last visited Dec. 20, 2013), provides,

While an employee must have a substantial amount of irregular overtime with certain characteristics to qualify for AUO pay, once AUO pay becomes applicable it becomes the sole compensation under title 5 for ALL irregular overtime or occasional hours. (See 5 CFR 550.163(b). Note also that all irregular or occasional overtime hours are used in determining the AUO percentage under 5 CFR 550.154(a).) The type of hours needed to qualify for AUO pay (i.e., qualifying conditions in 5 CFR 550.153) are narrower than the type of hours compensated by AUO pay.

Additionally, the OPM Compensation Policy Memorandum 97-5A states, “[W]hile the conditions for AUO pay... ‘generally’ require that an employee’s hours of duty may not be subject to administrative control, that does not mean that overtime work must be compensated on an hourly basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time.” OPM Compensation Policy Memorandum 97-5A, *Guidance on Administratively Uncontrollable Overtime (AUO) Pay* § III (June 13, 1997).

IV. Listing of any Violation or Apparent Violation of Law, Rule, or Regulation

The ICE OPR supplemental investigation made a variety of findings regarding the reporting and justifications for AUO that were provided by Houston Field Office employees. Specifically, the investigation found that there has been minimal guidance from both ICE ERO Headquarters and the Houston Field Office concerning the use of AUO and approval of AUO justifications. This appears to have caused inconsistent review of AUO justifications by Houston Field Office first line supervisors. For example, if an employee submits an AUO justification stating “cleaned up paperwork,” one supervisor may ask for additional clarification, while another supervisor may consider it a valid justification.

The lack of consistency, in conjunction with the absence of additional ICE policy and guidance, appears to have contributed to Houston Field Office employees providing justifications that are inconsistent with the purpose of AUO. The current ICE process for recording AUO premium pay does not allow for a uniform agency standard for the approval of AUO qualified work for DOs or IEAs by the approving supervisors. This creates confusion for the AUO certified employee, since supervisory approval is subjective and inconsistent.

Because OPR’s previous investigation did not include a detailed audit of the AUO justifications provided by the 28 randomly sampled employees, for the supplemental investigation, MIU created detailed spreadsheets analyzing each of the 28 employees’ justifications. Of the randomly selected 28 employees whose AUO records were audited by MIU, approximately 54%

¹ The OPM guidance was not specifically referenced during OPR’s underlying investigation. However, ICE is including it within this report given its relevance to the subject matter.

of the justifications were found to be “noncompliant,” as they appeared inconsistent with the purposes of AUO. Approximately 33% were found to be “undetermined,” as they were vague and it was unclear whether they warranted AUO. Approximately 12% of the justifications were found to be “sufficient.” Additionally, MIU did not note any improvements in justifications for AUO following the publication of its December 2012 report regarding AUO deficiencies.

V. Description of Action Taken or Planned as a Result of Investigation

ICE is committed to administering overtime pay in a manner that is consistent with law, regulation, and policy. To that end, ICE will be initiating a variety of measures to ensure that AUO is properly administered not only within the Houston Field Office, but across the agency. Specifically, ICE will issue guidance and training that clearly explain proper AUO practices, provide employees with an updated method of recording AUO hours, and conduct a thorough review of all positions currently authorized for AUO to confirm that they meet the regulatory criteria. Additionally, the agency will continue to promptly investigate all claims of AUO abuse and will take appropriate remedial action.

A. Guidance Memoranda on Proper AUO Administration

To ensure that employees receiving AUO understand and follow the relevant AUO laws, ICE has drafted and will be issuing two guidance memoranda—one for all employees receiving AUO, and one for supervisors with subordinates who receive AUO.

The guidance memorandum for supervisors explains the supervisor’s role and responsibilities with respect to proper AUO administration. The memorandum instructs supervisors to determine whether their subordinate employees’ AUO justifications are consistent with AUO law and policy, and to work with the Office of Human Capital to decertify those individual whose duties are not consistent with the regulatory criteria for AUO.

The guidance memorandum for all employees receiving AUO includes a description of the types of “administratively uncontrollable” duties that generally warrant irregular and occasional overtime justifying AUO. The guidance also differentiates those duties that can be controlled administratively. Specifically, the guidance explains that where a duty can be readily scheduled in advance of the administrative workweek or performed during an employee’s next tour of duty, it does not warrant AUO.

B. AUO Training

ICE’s Office of Training and Development will develop AUO training for employees and supervisors. The training will address the regulatory criteria for AUO certification, the types of duties that general warrant irregular and occasional overtime that is properly compensated by AUO, and the responsibilities of employees and supervisors with respect to claiming and monitoring AUO hours. The training will be given at ICE’s Supervisory Leadership Training, as well as offered on Virtual University, ICE’s electronic database for training opportunities.

C. Agency-wide Directive

ICE's Office of Human Capital has drafted an agency-wide directive governing AUO. The directive includes an explanation of the responsibilities of the agency's different program heads, the officials who certify employees for AUO, and the employees receiving AUO. The directive also includes procedures for determining AUO coverage, initiating AUO payments, and decertifying AUO where appropriate.

D. New AUO Form with Duty Codes and Justifications

To ensure the proper administration of AUO, the agency is developing an updated form for recording AUO and will provide employees with a list of duty codes from which to select when recording AUO hours. The duty codes will correspond to a detailed justification document, which explains those duties that generally warrant AUO and provides employees with detailed instructions for properly justifying AUO on their timesheets.

E. Position-by-Position Review

ICE will conduct a position-by-position review of each position that is currently authorized for AUO, to confirm that the duties performed by employees occupying each position truly reflect "administratively uncontrollable" duties, as described in the regulatory criteria. Employees occupying positions that are determined not to meet the criteria for AUO will be decertified. ICE expects to begin the position-by-position review in early February, and estimates that it will take approximately 90 days to complete. To the extent that the position-by-position review finds that employees who do not meet the regulatory criteria are receiving AUO, those employees will be decertified.

F. Overtime Pay Guide

The Office of Human Capital has drafted a detailed pay guide explaining the different overtime laws that govern ICE employees. Because some employees may be decertified pursuant to the position review being conducted at ICE, the agency plans to distribute the overtime pay guide in order to explain the types of compensation that remain available to decertified employees where appropriate. The guide will include an explanation of the process and standards for requesting overtime consistent with the Fair Labor Standards Act and Federal Employees Pay Act.