



**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 Nos. DI-13-2853 and DI-13-3516

Dear Ms. Lerner:

The enclosed report is in response to your referral of allegations that employees of the Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP), U.S. Border Patrol (BP), San Diego Sector, Asset Forfeiture Office in San Ysidro, CA 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 employees Supervisory Paralegal Specialist Jim Elam and Seized Property Specialist Daniel McLoughlin at the Asset Forfeiture Office; both consented to the release of their names. By letter dated July 29, 2013, OSC referred these allegations and a request for an investigation to the Honorable Janet Napolitano. On September 9, 2013, the matter was referred to the CBP Office of Internal Affairs for investigation. I was designated as the official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213. The findings are 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 black 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

1. SUMMARY OF THE INFORMATION WITH RESPECT TO WHICH THE INVESTIGATION WAS INITIATED

In brief, Supervisory Paralegal Specialist (PS) Jimmy Elam and Seized Property Specialist (SPS) Daniel McLoughlin, employees of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), Office of Border Patrol (OBP), San Diego Sector, Asset Forfeiture Office (AFO) in San Ysidro, California (CA), alleged to the Office of Special Counsel (OSC) that all Border Patrol Agents (BPAs) assigned to the San Diego Sector AFO routinely claimed two hours of daily Administratively Uncontrollable Overtime (AUO) and failed to perform their duties during the time they were purportedly performing duties that qualified them for AUO.

On July 29, 2013, the OSC referred these allegations and a request for an investigation to then DHS Secretary Janet Napolitano. On September 9, 2013, the matter was assigned to CBP, Office of Internal Affairs (IA) for investigation. Field investigative work began on September 17, 2013, at CBP-IA San Diego Field Office (SDFO).

Further allegations contained in the OSC letter of July 29, 2013, are summarized as follows:

- San Diego Sector AFO BPAs frequently and routinely abused AUO, and first-hand observations were consistent with an OBP AUO report finding that on average BPAs nationwide averaged two hours of daily AUO work.
- San Diego Sector AFO BPAs claimed AUO beyond their regularly scheduled work hours of 0700 to 1500, part of which purported AUO time was spent on controllable, routine administrative work and part of which was not worked at all.
- San Diego Sector AFO BPAs Antonia Galvez, Roman Gulley, and Nick Santos from the AFO paralegal section claimed two hours of AUO daily while working on assigned administrative paralegal work as evidenced by End of Shift (EOS) reports¹ submitted by these BPAs and reviewed by Supervisory PS Elam.
- Supervisory PS Elam observed BPAs Galvez, Gulley, and Santos working on administrative matters each day when Supervisory PS Elam departed for the day at 1630, which is one and a half hours after the BPAs' regularly scheduled work hours ended.
- Earlier in Fiscal Year (FY) 2013², AFO Field Operations Supervisor (FOS)/Program Manager/Asset Forfeiture Officer Omar Alvarez tasked

¹ EOS reports are not used to record AUO hours worked; instead, they are used individually and collectively mostly by all AFO OBP personnel, to document generally what was worked on during each entire work day.

² Whistleblower Jimmy Elam identified the relevant time period to be October 2012 through April 2013.

Supervisory PS Elam to conduct a leave audit by reviewing the Time & Attendance (T&A) records for all AFO BPAs. During his audit, Supervisory PS Elam noted that the majority of AFO BPAs claimed two hours of AUO for each day.

- San Diego Sector AFO BPAs were observed at their desks when Supervisory PS Elam and SPS McLoughlin departed the AFO at 1630 hours.
- Supervisory PS Elam and SPS McLoughlin regularly observed San Diego Sector AFO BPAs leave the AFO between 1635 and 1640 hours and the AFO BPAs were not present for the remainder of the AUO hours they claimed. SPS McLoughlin observed this early departure once a week while he remained outside in the AFO parking lot after completing his shift.

In support of these allegations, Supervisory PS Elam provided the OSC with the following documents:

- An OBP AUO summary report covering the time frame from pay period 23 starting November 4, 2012, to pay period 09 ending May 18, 2013, which depicted the average number of AUO hours claimed daily by BPAs for all of the OBP Sectors nation-wide was two hours.
- A memorandum, dated May 15, 2013, from Michael J. Fisher, Chief, OBP regarding minimizing overtime expenditures. In this memorandum, Chief Fisher stated: “[a]gents are still claiming AUO hours in whole hours, and in many instances, are claiming two hours a day for every single day worked. These practices require closer review and scrutiny by supervisors and managers... All employees are required to claim AUO hours worked in 15-minute increment[s]....”

On September 16, 2013, the OSC sent CBP-IA Headquarters (HQS) additional information provided by Supervisory PS Elam. According to the OSC, Supervisory PS Elam had access to a T&A database and was able to obtain T&A records for BPAs Galvez, Gulley, and Santos, and Supervisory BPA (SBPA) Cami Day, who had been detailed to the office on limited duty. According to Supervisory PS Elam, each of these individuals claimed AUO despite working on administrative matters in his or her respective assigned position. The T&A records, which turned out to be CBP Overtime Scheduling System (COSS)³ records--more specifically, Employee Work Schedule

³ COSS allows supervisors to schedule regular and overtime work assignments for their employees. The system keeps track of schedule and assignment data, maintains projected and actual costs, pay cap status, equalization, staffing, budgeting, time and attendance, and billing information for over 46,000 CBP employees. COSS also provides a variety of on-line and batch reporting functions to track overtime and premium pay and to ensure CBP personnel are “cap compliant” as mandated by Congress. COSS came on-line after the CBP Payroll System Handbook was issued. The CBP Payroll System Handbook has not been updated since COSS’ inception.

Functions – Summary of Schedule for Payment--for specific pay periods in 2012 and 2013 were subsequently forwarded to CBP-IA SDFO.

2. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

Introduction

This report documents the results of an investigation of the AFO's use of AUO pay. The objective of the report was to determine whether the eligibility criteria for AUO work and the payment of such overtime compensation were in compliance with Federal statutory and regulatory requirements.

Resources Available

CBP currently relies upon laws, existing guidelines, policies, manuals, and forms from previous agencies, i.e., Immigration and Naturalization Service (INS) and the United States Customs Service (USCS), in the administration and management of AUO. Before the creation of CBP, the INS and the USCS, respectively, administered AUO pay for their employees performing AUO-eligible work. CBP does not have its own central AUO policy. Throughout this report, reference will be made to INS policies, statements, and guidelines. It should be noted that the existence of a variety of instructions and the lack of a single comprehensive CBP-central AUO pay policy/statement, have contributed to problems with AUO pay administration and management. Nevertheless, guidance on the use of AUO pay issued by the former INS is generally consistent with AUO pay law and is readily available to OBP personnel on CBPnet Secure⁴ under the U.S. Border Patrol Reference Library, and can be accessed by conducting a search of all CBP sites on CBPnet Secure for "AUO." Moreover, INS policies and procedures in the INS Administrative Manual (AM) Procedures Volume can be found on the Immigration and Naturalization Service Easy Research and Transmittal System⁵ (INSERTS) through CBPnet. The INS AM mirrors most of the requirements of applicable law and regulations for the proper payment of AUO. It should be noted that witness statements in this investigation exhibited that the majority of OBP personnel were familiar with the definition of AUO and how one earns or works AUO, but were not familiar with where to find the legacy INS AUO guidelines and policies.

Background

⁴ CBPnet Secure is the branded SharePoint tool utilized by CBP. It is an integrated suite of server capabilities that improves organizational effectiveness by providing comprehensive content management and enhanced search abilities. These capabilities improve shared business processes, making information-sharing more efficient. CBPnet Secure supports enterprise-wide intranet, extranet, and Web applications, instead of relying on separate fragmented systems. The CBPnet Secure (SharePoint) site was launched in 2007 as a solution to help CBP employees share and view information.

⁵ INSERTS is a reference library program available online and on compact disc. INSERTS organizes material as virtual "books" on a shelf.

5 U.S.C. sec. 5545(c) (2) authorizes premium pay on an annual basis for Federal employees who are in positions in which the hours of duty cannot be controlled administratively; in which the employee is required to perform substantial amounts of irregular, unscheduled overtime duty; and in which the employee generally is responsible for recognizing, without supervision, circumstances that require the employee to remain on duty. Overtime work that meets these criteria for premium pay is referred to as AUO.

Federal guidelines for implementing AUO are contained in Title 5 Part 550 of the Code of Federal Regulations (Pay Administration—General—specifically, 5 C.F.R. §§ 550-151-164 (Administratively Uncontrollable Work)). The C.F.R. authorizes the use of this premium pay only for those employees “who must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.” 5 C.F.R. §550.153 (c) (2). The Code further states that the amount of pay should be based on a percentage of not less than 10 percent or more than 25 percent of the employee’s base pay. 5 C.F.R. § 550.154(a). The percentage of pay is to be based on consideration of previously worked irregular or occasional overtime hours and any other information bearing on the number of hours of duty that may reasonably be expected to be required in the future. 5 C.F.R. § 550.161(c). Employees who receive AUO pay are also eligible for other types of premium pay, such as regular overtime, night differential, and Sunday or holiday pay. 5 C.F.R. § 550.163.

Scope of Investigation

With respect to AUO payments, the scope of CBP-IA SDFO’s investigation was limited to AUO payments made to BPAs and supervisors at the AFO for the time period from September 23, 2012, through June 1, 2013. This was roughly the period for which Supervisory PS Elam conducted his leave audit for the AFO.

CBP-IA agents from the SDFO interviewed current and former AFO BPAs and civilians and obtained relevant evidence from the AFO, San Diego Sector Headquarters, and CBP databases regarding BPAs assigned to the AFO between April 2012 and July 2013. The evidence obtained and reviewed consisted of Form G-1012s - Record of AUO Hours Worked; COSS records – Summary of Schedule for Payment and Employee Work Schedule; AFO EOS reports; and other documents.

The following policies, regulations, manuals, guides, directives, orders, memorandums, law, and databases were reviewed; referred to; and at times quoted and emphasized in the course of this investigation and report to support the investigation’s findings.

- USCS Payroll System Handbook (June 1993).
- 5 C.F.R. § 550.151 – Authorization of premium pay on an annual basis.
- 5 C.F.R. § 550.153 – Bases for determining positions for which premium pay under § 550.151 is authorized.
- 5 C.F.R. § 550.154 – Rates of premium pay payable under §550.151

- 5 C.F.R. § 550.161 – Responsibilities of the agencies.
- 5 C.F.R. § 550.162 – Payment provisions.
- 5 C.F.R. §550.163 – Relationship to other payments.
- 5 U.S.C. § 5545 – Night, Standby, Irregular, and Hazardous Duty Differential.
- INS Policy Statement 1.3.103 - Administratively Uncontrollable Overtime Pay (January 2000).
- INS AM Procedures 1.3.103 - Administratively Uncontrollable Overtime Pay (January 2000).
- INS Administratively Uncontrollable Overtime Training Guide (September 22, 1997).
- USCS Directive No. 51550-004A - Administratively Uncontrollable Overtime (June 29, 2000).
- CBP 2006 Payroll Time and Attendance Manual.
- OBP Memorandum – Minimizing Overtime Expenditures (May 15, 2013).
- OBP Memorandum – Administratively Uncontrollable Overtime Guidance (December 10, 2012).
- OBP Memorandum – Detail to San Diego Sector AFO (August 22, 2013).
- OBP Memorandum – Use of Administratively Uncontrollable Overtime at Checkpoints (January 14, 2008).
- OBP Memorandum – Selection for San Diego Sector AFO Detail (October 23, 2013).
- Department of Justice (DOJ) Order 1551.4A (August 1, 1975).
- Office of Personnel Management (OPM) Guidance on AUO Pay (June 16, 1997).
- COSS Employee Work Schedules (T&A files/records).

A CBP-IA Integrity Programs Division (IPD) Senior Operational Analysis Specialist extracted electronic records from COSS, which OBP uses to process its payroll, and provided CBP-IA with data worksheets for BPAs formerly and currently assigned to the AFO. The data worksheets cover the time period from September 23, 2012, to June 1, 2013, and depict the BPA's daily AUO hours and actual AUO hours as recorded in COSS.

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

- FOS/Program Director/Asset Forfeiture Officer Omar Alvarez
- SBPA Alan Mills
- SBPA Miguel Mendez (no longer assigned to the AFO)
- BPA Ruben Moya
- BPA Joe Wong
- BPA Roman Gulley
- BPA Nick Santos
- BPA Octaviano Rodriguez Jr.
- BPA Antonia Galvez
- BPA Lilian Cuevas (no longer assigned to the AFO)

- Supervisory PS Jimmy Elam
- PS Travis Oakley
- PS Judy Grano
- SPS Douglas Dunwoody
- SPS Daniel McLoughlin
- Mission Support Assistant (MSA) Juan Noriega

San Diego Sector AFO

The San Diego Sector AFO is located at 3752 Beyer Boulevard in San Ysidro, CA, at the Border Patrol Chula Vista Station. Staffing at the AFO includes a Program Manager, an Asset Forfeiture Officer, a SBPA SPS, SPSs (civilians and BPAs), PSs, a Supervisory PS, and a MSA. For BPAs, the San Diego Sector AFO assignment is a temporary detail that usually does not exceed two to three years. Currently, the San Diego Sector AFO is staffed with approximately 15 personnel consisting of one FOS/Program Manager/Asset Forfeiture Officer, one SBPA, seven BPAs, and six full-time civilians.

All CBP seized property is managed by SPSs or Alternate SPSs. All SPSs receive training at the Federal Law Enforcement Training Center (FLETC) or in FLETC sanctioned satellite classes. The OBP utilizes both General Schedule (GS) series 1896 BPAs trained as Alternate SPSs and GS series 1801 SPSs (civilians).

Under the Seized Asset Management and Enforcement Procedures Handbook (SAMEPH), all seized property, which includes property seized as evidence, is the responsibility of the Asset Forfeiture Officer. The SPSs report directly to the SBPA SPS who reports to the Asset Forfeiture Officer. For evidentiary property, the Asset Forfeiture Officer, in coordination with the prosecution case agent, will manage seized evidence and disposal of property when it is no longer needed for evidence in a trial.

All high-risk seized property processed by the AFO must be transferred to a CBP vault per SAMEPH. High-risk seized property is defined as controlled substances, currency, firearms, and ammunition.

The Asset Forfeiture Officer has overall responsibility for the effective management of all seized property; post seizure investigation; and Fines, Penalty, and Forfeiture case processing. The Asset Forfeiture Officer must ensure that all seizures follow CBP procedure and that all case documentation is complete and accurate. The Asset Forfeiture Officer may recommend procedural changes within the sector in order to comply with CBP policies.

Beginning in or about April 2012, FOS Alvarez reported for duty at the AFO where he became the AFO Program Manager responsible for the entire AFO. At that time, the AFO consisted of a seized property section and a paralegal section. The seized property section was staffed with BPA Alternate SPSs, and two civilian SPSs. FOS Alvarez supervised SBPA Mills, who at the time was the AFO Asset Forfeiture Officer,

and SBPA Mendez, who supervised the BPAs and civilians in the AFO, seized property section. The paralegal section was staffed with five full-time civilian PSs. When FOS Alvarez reported to the AFO, there was no civilian supervisory position in the AFO paralegal section, and there were no BPAs assigned to the AFO paralegal section. In or about March 2013, SBPA Mendez left the AFO and the AFO management team was realigned. FOS Alvarez assumed more duties by also becoming the Asset Forfeiture Officer, and former Asset Forfeiture Officer Mills became the supervisor for the BPA Alternate SPSs and civilian SPSs. In or about April 2013, SBPA Cami Day was detailed to the AFO but was only there approximately three months before she left on maternity leave.

There are seven BPAs detailed to the AFO. BPAs Wong, Moya, Rodriguez Jr., and Gulley are assigned to the AFO seized property section as BPA Alternate SPSs; and BPAs Galvez, Santos, and Jessica K. Schwamberger, who joined the AFO on October 6, 2013, are assigned to the AFO paralegal section. The BPA Alternate SPSs have the same daily duties as the civilian SPSs with additional law enforcement functions, and the BPAs assigned to the paralegal section have the same daily duties as the civilian PSs. Oftentimes, the BPAs in the paralegal section will augment the seized property section when needed.

There are a total of six full-time civilian personnel at the AFO. The civilian personnel consist of Supervisory PS Elam, PSs Oakley and Grano, SPSs McLoughlin and Dunwoody, and MSA Noriega. Before October 2012, there were five civilian AFO PSs. In October 2012, PS Elam was promoted into the newly created Supervisory PS position and two other civilian PSs left or retired from the AFO. In or about October 2012, FOS Alvarez began assigning BPAs to the paralegal section to fill the civilian PS vacuum. The BPAs were detailed into the AFO from the field or other assignments.

It should be noted that civilians working at the AFO are not entitled to AUO pay and currently are not allowed to work any overtime; however, there have been times in the past when they were given compensatory time for their overtime hours. Some civilians work an alternate work schedule where during a pay period they work from 0700 to 1630 hours with every other Monday off and then work an eight-hour shift on the other Monday they do not have off. The remaining civilians work a regular eight and half hour work schedule (0800 to 1630) Monday through Friday with 30 minutes for lunch.

The San Diego Sector AFO oversees all aspects of evidence and property seized or held throughout the San Diego Sector. The seizures include currency and monetary instruments, illegal drugs, weapons, vehicles, vessels, or any other illegal contraband or item of evidentiary value. The AFO BPAs travel to area field stations (field elements) to collect these seizures, which are held by the station property custodians. These trips are always scheduled and conducted during normal AFO business hours. The AFO conducts investigations (conducting criminal history checks through computer database searches) into violators and owners of seized property to assist with the assessment of penalties; however, the office does not conduct field investigations. The office is also responsible for dealing with contractors that handle the seized vehicles and conducting

vehicle screenings, which includes K-9 checks and X-Ray scans. The seizures and vehicle screenings are handled by the BPA Alternate SPSs and the civilian SPSs. Also, the AFO provides guidance in seizure related matters to help ensure seizures and forfeitures are lawful, thereby preserving the property owner's rights. After a seizure is made, there are public notices and seizure notices that need to be sent to all parties with an interest in the seized property. In response to these notices, the AFO receives claims and/or petitions from interested parties trying to get the seized property back. The AFO has 90 days to respond to these claims and/or petitions. These duties are normally handled by the BPAs and the civilian PSs in the AFO paralegal section. The AFO paralegal section has an important function because the seizures and forfeitures can deny the offender his/her use of the seized property, which could be used as a means to commit other criminal violations. Furthermore, the AFO is a significant factor because the asset forfeitures help disrupt and dismantle criminal organizations.

The number of processed San Diego Sector AFO seizure cases has been extremely steady over the past three Fiscal Years (FYs). In the following FYs the San Diego Sector AFO processed the following number of seizures: FY2011 - 1,661, FY2012 - 1,627, and FY2013 - 1,612. According to the AFO BPA interviews, the San Diego Sector AFO is a dynamic office that services approximately nine different field stations in the San Diego Sector.

3. SUMMARY OF ANY EVIDENCE OBTAINED FROM THE INVESTIGATION

The investigation confirmed the following allegations made by SPS McLoughlin and Supervisory PS Elam:

- Overtime work at the San Diego Sector AFO was improperly paid as AUO as defined by 5 C.F.R. § 550.151 – Authorization of Premium Pay on an Annual Basis, § 550.153 – Bases for Determining Positions for which Premium Pay under § 550.151 is Authorized, § 550.161 – Responsibilities of the Agencies, and § 550.162 – Payment Provisions. The overtime work documented and claimed as AUO was controllable and administrative in nature and not AUO-qualifying work.
- A majority of the time, San Diego Sector AFO BPAs and SBPAs claimed two hours of daily AUO work, which were claimed as taking place immediately after their regularly scheduled eight-hour work shift. The AUO work hours documented and claimed were not irregular or occasional and basically were just an extension of their regularly scheduled eight-hour shift, i.e., employees just continued performing the same work duties as they had been performing during the regular shift hours. This continuation of performing the same work duties during AUO hours is not, in and of itself, a sign of noncompliance with AUO policy but that the work of the AFO is not AUO-eligible.
- San Diego Sector AFO BPAs Galvez, Gulley, and Santos from the AFO paralegal section claimed, a majority of the time, two hours of AUO occurring

immediately after their regularly scheduled eight-hour shift while working on assigned administrative paralegal work that was controllable and administrative in nature.

- The San Diego Sector AFO BPAs and supervisors are not eligible to receive AUO pay, because the work performed at the AFO was not AUO-qualifying work and the assignment to the San Diego Sector AFO is a temporary detail exceeding 10 days. The work performed at the AFO, although recorded and claimed as AUO, was controllable and administrative in nature, not irregular or occasional overtime work, and not AUO-qualifying as defined by 5 U.S.C. 5545(c)(2).

In general, the investigation revealed that the work performed by BPAs and supervisors assigned to the San Diego Sector, although documented and claimed as AUO work, was controllable, administrative in nature, and, for the most part, extended their regularly scheduled hours/shift by approximately two hours each day. Per applicable law, policies, and regulations, BPAs' and supervisors' hours worked at the AFO and documented as AUO, were not irregular or occasional, and the work performed was not AUO-qualifying work. CBP-IA agents arrived at this conclusion after interviewing all AFO personnel and after reviewing the following: COSS records; G-1012 forms; EOS reports; OBP Memorandums; Authorities 5 U.S.C § 5545(c)(2), 5 C.F.R. § 550.151 – 164, and DOJ Order 1551.4A; the INS AM; INS AUO Training Guide; OPM Guidance on AUO; and USCS Directive No. 51550-004A.

The allegation made by Supervisory PS Elam that the BPAs were not working at all during their hours claimed as AUO was not substantiated. AFO management and AFO BPAs claimed they worked during their hours claimed as AUO.

4. LISTING OF ANY VIOLATION OR APPARENT VIOLATION OF LAW, RULE, OR REGULATION

A. AUO Pay to AFO BPAs and AFO management officials conflicts with INS Policy Statement 1.3.103 and INS AM (Procedures Volume) Section 1.3.103 – Administratively Uncontrollable Overtime Pay.

The INS Administrative Manual Policy/Procedures

The INS AM remains in effect, unless superseded, due to the savings provision contained in the Homeland Security Act of 2002. (6 U.S.C. § 552)

The AM establishes Policy Statements and references corresponding Implementing Procedure Statements which are contained in a separate volume. The Implementing Procedure Statements reference separate handbooks, instructions, and guides, e.g., INS Policy Statement 1.3.103 – AUO Pay, INS AUO Training Guide, AUO Training Video, and Form G-1012 – Record of AUO Hours Worked, where detailed implementing procedures reside; or they may include the detailed procedures as attachments.

It is important to note that the AM is a "living document." The division of the AM into two volumes, one of Policy Statements and one of Implementing Procedure Statements, reflects this concept. Over time, Policy Statements should become static as changes to them become less frequent. However, the Implementing Procedures could change more frequently as a result of rapidly changing requirements, process improvements, or organizational changes. The separation into two volumes facilitates the use and maintenance of the AM.

All employees are required to follow the Policy Statements and corresponding Implementing Procedures in the performance of their jobs.

1. *INS AM Policy Statement 1.3.103 – "Administratively Uncontrollable Overtime Pay" located in the AM Policy Volume states the following:*

It is the policy of the Immigration and Naturalization Service to pay Administratively Uncontrollable Overtime (AUO) to employees in positions in which the hours of duty cannot be controlled administratively, and which require substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require remaining on duty. (00)

INS AM Policy Statement 1.3.103 references the following authorities: (1) 5 U.S.C. sec. 5545(c) (2), (2) 5 C.F.R. sec. 550.151-164, and Human Resources, DOJ Order No. 1551.4A, August 1975.

The Responsible Officials for the Policy Statement were the Assistant Commissioner, Human Resources and Development; and Director, Human Resources, at INS Headquarters, Washington, D.C.

The Implementing Procedure (in the INS AM Procedures Volume) for the Policy Statement is 1.3.103 - "Administratively Uncontrollable Overtime Pay."
This Policy Statement was approved January 2000 by George H. Bohlinger III, Executive Associate Commissioner Management.

2. *The INS AM Procedures Volume, Section 1.3.103 – "Administratively Uncontrollable Overtime Pay," states the following:*

The purpose of this procedure is to implement the policy statement by providing guidance on work situations that support the payment of AUO; instructions on the methods to be used for certifying the percentage of AUO to be earned by employees; and standards that ensure that employees who earn AUO receive appropriate compensation for overtime hours worked. (00)

INS AM Procedures Volume, Section 1.3.103, references the following documents: (1) INS Policy Statement, Section 1.3.103 – "ADMINISTRATIVELY UNCONTROLLABLE OVERTIME PAY" January 2000; *AUO Training Guide* dated September 22, 1997;

AUO Training Video dated September 26, 1997; and Form G-1012, Record of AUO Hours Worked.

3. *The INS AM Procedures Volume, Section 1.3.103 – “Administratively Uncontrollable Overtime Pay,” contains the following relevant information:*

Law enforcement positions covered under the provisions of 5 U.S.C. sections 8336(c) and 8412 (referred to as “6(c)”) are eligible for AUO. The law enforcement positions are listed on Attachment K under this section. A BPA is listed as one of those positions.

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.

Form G-1012, “Record of AUO Hours Worked,” is the official record of AUO hours worked by every INS employee who earns AUO. It is used to record the number of hours worked and the type of work performed that is credited to and paid for under AUO. The INS AM requires that the Form be signed each pay period by the employee and by the immediate supervisor. It is to be retained for a minimum of six years in the employee’s T&A folder and should be available for review by interested parties. Supervisors and managers are responsible, as certifying officials, for ensuring that employees are actually performing AUO duties in accordance with the policy and guidance provided in the INS AM; and for reviewing and signing the Form G-1012 for each employee performing AUO work every pay period.

For an employee to be approved to earn AUO pay, a determination must be made by the immediate supervisor, or by a higher level supervisor or manager, that an employee has work assignments that frequently require unscheduled overtime work that cannot be controlled, that the AUO hours reported by the employee are actually worked, and that therefore the employee may earn a specified percentage of AUO annual premium pay. This determination is to be documented on a certification form separate from the Form G-1012.

4. *The INS AM Procedures Volume provides information from the Office of Personnel Management (OPM) regarding guidance on AUO pay.*

The OPM provides examples of incorrect applications of AUO pay authority. Some examples of potential misuses of the AUO pay authority which should be identified and corrected are the following:

- (1) Payment of AUO pay to an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work;

(2) Crediting of hours of work for AUO pay that are clerical or administrative in nature, can be easily scheduled in advance, and do not involve independent investigative or other administratively uncontrollable work.... (00)

5. *The INS AM Procedures Volume also contains DOJ Order 1551.4A – Administratively Uncontrollable Overtime Pay 1.3.103 (August 1, 1975).*

This Order establishes policy and procedures governing the payment of premium pay on an annual basis for AUO duty under sections 5 C.F.R. § 550.151-163. This order applied to all organizational elements of the DOJ. Before the creation of DHS, INS was under the DOJ. This particular order references 5 C.F.R. §§ 550.151-163 and 5 U.S.C. § 5545(c) (2).

The Order lists eligible positions authorized to receive AUO pay. The Order also provides general guidelines in determining whether or not the particular duty qualifies under AUO pay. Examples include surveillance, shadowing, undercover activities, meeting informants, guarding prisoners or detaining witnesses. Supervisors engaged in these or similar activities also qualify for AUO pay.

The Order prescribes that the responsibility for determining eligibility for and payment of AUO rests with each agency head. This includes determining which employees in authorized positions shall receive AUO, determining the number of AUO hours and reimbursement rates, ensuring AUO is kept to the minimum essential to accomplish the mission of the agency, and providing written instructions on AUO.

The Order's policy is that "Employees in positions in which the hours of duty 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 which require them to remain on or return to duty outside of regular duty hours, shall be paid administratively uncontrollable overtime pay for such irregular or occasional overtime work."

The Order also lists the criteria for determining positions for which AUO pay is authorized. Per the Order, AUO pay is authorized under the following criteria:

a. The position must be one in which the hours of duty cannot be controlled administratively, e.g., by hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required.

b. In order to satisfactorily discharge the duties of the position, its occupant is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:

(1) A substantial amount of irregular or occasional overtime work means an average of at least three hours a week of that overtime work.

- (2) This irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.
- (3) 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 minimum requirements under paragraphs (2) a and b above.

c. The employee's responsibility for remaining on or returning to duty when required by circumstances must be a definite official and special requirement of his position. The employee must remain on or return to 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.

d. The circumstances which require an employee to remain on or return to duty permit the employee no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty or resumes duty in accordance with a prearranged plan or an awaited event. (00)

The Order also lists AUO qualifying and non-qualifying duty. The Order makes the point that, the fact that an employee occupies an authorized AUO position does not necessarily mean the employee is qualified to receive AUO. The Order points out that there are additional criteria applicable to determining whether or not an employee is qualified to receive AUO pay. Furthermore, the Order points out that any employee who accepts an assigned temporary detail for more than 10 consecutive prescribed workdays, or for a total of more than 30 workdays in a calendar year while on such assignment to other duties in which conditions do not warrant AUO pay, shall not be eligible to continue to receive premium pay.

Investigative Findings

During the interviews with OBP AFO personnel, CBP-IA agents reached three conclusions: (1) the AFO BPAs, supervisors, and civilians described the BPAs' daily duties and AUO duties as being the same duties whether in the seized property section or the paralegal section; (2) AUO hours worked were described as a continuation of the BPA's daily duties; and (3) the BPAs' duties were identical to the civilian (PSs and SPSs) duties, except for certain law enforcement functions performed only by the BPAs. The supervisors confirmed that BPAs in the paralegal section performed duties similar to that of a PS, and sometimes BPAs in the paralegal section were given extra duties, e.g., post-seizure investigations and assisting the SPSs. The BPAs, supervisors, and civilian personnel described the BPA's duties as follows: conducting post-seizure discoveries (contraband found in seized vehicles at contracted services' sites); post-seizure investigations; acquiring seized property from the different field stations ("milk runs"); transportation of high-risk property to the CBP Office of Field Operation (OFO) vault at the Otay Mesa Port of Entry - Cargo Export facility; acceptance of high and

low-risk property at the AFO; entering data into the Seized Asset and Case Tracking System⁶ (SEACATS); processing seized property; transportation of contraband to the Drug Enforcement Administration Laboratory in Vista, CA; assisting other BPAs in the field with property seizures; reviewing seized property cases; drafting and sending notices to relevant parties associated with the seizures; creating dispositions for the SPSs; conducting petition investigations; performing time-sensitive work with deadlines; receiving and sending mail; organizing files; completing miscellaneous paperwork; and conducting computer checks (criminal) on individuals and vehicles associated with a vehicle seizure.

The BPAs claimed they worked AUO because the case load at the AFO was voluminous, and they needed to stay current with the case load so as not to fall too far behind in their work. As previously mentioned, the San Diego Sector AFO over the past three FYs had processed a fairly consistent amount of seizures.

On the whole, the interviews revealed that BPAs at the AFO used AUO primarily to continue working on their daily duties, which by definition, are controllable and administrative in nature. As such, these hours should not have been claimed as AUO hours worked. Furthermore, the BPAs were aware of the definition of qualifying AUO duties, but described the work performed most frequently during AUO hours as routine administrative duties or a continuation of their daily duties. For the most part, the AUO hours were worked at the conclusion of their regularly scheduled work hours, because at the time it was desirable to earn AUO pay at the 25% rate. The two hours of AUO work consistently documented at the conclusion of their regularly scheduled shift does not constitute irregular or occasional overtime work.

If a high-risk seizure was brought to the AFO near the end of the BPA's regularly scheduled work shift, the property was secured at the AFO, and the necessary paperwork to get the property secured was completed before BPAs departed the office. Any paperwork or follow up work related to the seizure would be conducted during the BPA's regularly scheduled work shift over the next few days. The work after securing the seizure is controllable and usually conducted during normal business hours.

Per the INS AM, irregular or occasional overtime work is defined as: "Overtime work that is not scheduled in advance of the administrative workweek and is not part of an employee's regularly scheduled administrative workweek." The administrative workweek is Sunday through Saturday. Throughout the interviews, BPAs reported few, if any, examples of being called out to the field stations or returning to work after their regularly scheduled work hours during the week and/or on the weekend. Any seizures made by OBP field elements outside of the AFO's regularly scheduled work hours were maintained by the field elements until the next business day when the seizure was turned over to BPAs from the AFO during normal business hours, i.e., 0700 to 1500

⁶ SEACATS is the cradle-to-grave system for tracking seized and forfeited property from case initiation to final resolution. It is the system of record for all law enforcement bureaus participating in The Forfeiture Fund. SEACATS has three primary functions: tracking all seizures that take place, property management of seized goods, and managing the fines and penalties associated with seizures.

hours. There are no staggered work shifts at the AFO to accommodate seizures made outside the office's regularly scheduled work hours, which again are from 0700 to 1500 hours.

Note, that according to OPM, "If an overtime work pattern exists, e.g., the employee consistently works 10 hours every day rather than varying hours, it is usually an indication that the work is not irregular or occasional and should not be compensated by AUO."

In summary, based on the interviews and analysis of the evidence gathered, AUO worked at the AFO was not irregular or occasional in nature, because the overtime work was performed at the same time each day over an extended period of time, on the same day each week, or performed regularly immediately following the BPA's basic daily tour of duty. In addition, documentation showed that the purpose of the overtime work was to complete administrative or clerical duties that are clearly not administratively uncontrollable.

AFO COSS Data Review

CBP-IA IPD, through COSS, conducted a data query of the daily employee work schedules (regular and AUO hours worked) for 11 AFO BPAs, which included current and past supervisors, for the time period September 23, 2012, to June 1, 2013. A review of the 11 AFO employee work schedules showed, a majority of the time, that at the end of each AFO BPA's regularly scheduled eight-hour work shift an additional two AUO hours were claimed, creating the appearance that the two AUO hours tacked on each day were controllable. More specifically, the COSS review showed that, for approximately 92% of the time during the period from September 23, 2012, to June 1, 2013, AFO BPAs (supervisors and non-supervisors) claimed an additional two AUO hours a day immediately following their regularly scheduled work hours.

AFO G-1012 Form Review

CBP-IA agents reviewed nine AFO current and former BPA employees' G-1012s, which covered the time period March 25, 2012, to June 1, 2013. This review also included records for two current supervisors and one previous supervisor. A large majority, if not all, of the reasons for AUO hours worked, appeared to be administrative in nature because most of their reasons for AUO hours worked depicted on their G-1012 forms under the column "REASON FOR AUO HRS WORKED OR ABSENCE" were as follows: (1) "Continuation of Duty," (2) "Examination of Evidence/Records," (3) "Seizure Investigations," (4) "Post Seizure Investigations," (5) "Examining Post seizure investigations," and (6) "Asset Forfeiture Office (AFO)." Seizure investigations and post-seizure investigations entail computer checks of various databases. The supervisors recorded the following reasons on their G-1012 forms: (1) "SUPDT Supervisory Duties," (2) "Cont. of Supervisory Duties," (3) "Reviewing/approving/Case files/and PSI's," (4) "Supervisory examining and reviewing AFO files," and (5) "Performing Time Sensitive Duties." It should be noted that the documentation for the

type of work performed or the reasons for AUO hours worked on the form G-1012 should not be the sole basis for establishing AUO eligibility. However, this documentation does support the evidence obtained from the OBP AFO personnel interviews that the AUO hours employees worked were a continuation of their daily duties, which were the same duties carried out by civilians, who are not eligible for AUO or other overtime compensation. These documented duties are being performed both during the BPAs' regular tour of duty and during their AUO work hours. Because AUO work is being credited improperly as irregular or occasional in nature, the AUO pay must be discontinued in this case in order to meet legal or regulatory requirements.

AFO EOS Reports Review

CBP-IA agents reviewed AFO seized property section EOS reports for the time period November 29, 2012, to May 31, 2013. The AFO EOS reports in the seized property section, which consisted of BPA Alternate SPSs and civilian SPSs, were completed collectively. The BPAs documented their activities and the civilian SPSs collectively documented their activities all on the same EOS report. With respect to the BPAs, there was no way to determine who completed the actions in the collective report, and there was no way to determine what actions were performed during AUO hours worked. However, the BPAs' activities shown on the EOS reports illustrate that the work performed was controllable and administrative in nature. All of the BPAs' documented activities were routine AFO functions.

CBP-IA agents reviewed the AFO paralegal section BPAs' individual EOS reports only for the month of May 2013. In October 2012, FOS Alvarez began assigning BPAs to the AFO paralegal section. At the time of the allegations, there were approximately three BPAs detailed to the paralegal section augmenting the short-staffed civilian PSs. They were BPAs Galvez, Santos, and Gulley. The requirement for EOS reports for the paralegal section was established in April 2013, but the reports were not actually required until May 2013. In or about April 2013, BPA Gulley was reassigned to the seized property section; therefore, BPA Gulley did not complete any individual EOS reports while he was in the AFO paralegal section. CBP-IA agents reviewed BPAs Galvez and Santos' EOS reports for the month of May 2013. The EOS reports displayed documented activities which were all routine functions of the AFO paralegal section. The work performed was controllable and administrative in nature.

As mentioned earlier, the EOS reports are not used to document AUO hours worked. They are used to document the AFO personnel's daily activities performed throughout the work day, which would include their daily activities while working AUO overtime if applicable. The paralegal section completed their EOS reports on the computer in Excel and the seized property section completed their EOS reports on the computer in Word. The EOS reports were kept on a shared drive in the computer system. These reports provide a good snapshot of what the AFO accomplished on a daily basis.

Interviews with BPAs Galvez, Gulley, and Santos from the Paralegal Section

Information derived from interviews with BPAs who worked in the AFO paralegal section makes clear that BPAs assigned to the AFO paralegal section have the same daily duties as the civilian PSs. These duties included, but were not limited to: sending out notices to interested parties associated with seized property; sending out disposition orders to contractors so they could dispose of seized vehicles; communicating with the United States Attorney's Office if there was a federal prosecution or with the District Attorney's Office if there was a state prosecution; preparing disposition orders for the OFO CBP vault; following up on claims and petitions filed for the return of the seized property; conducting criminal history checks on parties involved with the seized property; conducting short interviews with parties interested in the seized property; updating SEACATS; using the National Crime Information Center; and executing asset sharing with other agencies.

The AFO BPAs assigned to the paralegal section disclosed that, as a general matter, they worked a regularly scheduled work shift from 0700 to 1500 hours, Monday through Friday, with two attached AUO hours each day. The BPAs who were interviewed consistently described their AUO work as any work that carried over past the end of their regularly scheduled work hours/shift and had to be completed prior to departing.

During the interviews, the BPAs described their daily duties and duties performed during AUO hours worked as being the same. Per the BPAs, their AUO hours worked were a continuation of their daily duties, because their daily duties were time sensitive and had to be completed. However, the duties in the paralegal section could have been accomplished the next day, and it was not necessary to extend the work day an additional two hours, which is what happened. The additional two hours of AUO worked and claimed each day should not have been paid as AUO. According to law and agency policy, these activities were not AUO-qualifying work.

AFO COSS Data Review for BPAs Santos, Gulley, and Galvez

CBP-IA IPD, through COSS, conducted a data query of the daily employee work schedules (regular and AUO hours worked) for three AFO BPAs in the paralegal section, for the time period from September 23, 2012, to June 1, 2013. A review of the three AFO employee work schedules indicates, for a majority of the time, that at the end of each AFO BPA's regularly scheduled eight-hour work shift an additional two AUO overtime hours were claimed, suggesting that the two AUO daily overtime hours consistently recorded were controllable. More specifically, the COSS review showed that AFO BPAs in the paralegal section for the time period from September 23, 2012, to June 1, 2013, claimed an additional two AUO overtime hours daily immediately following their regularly scheduled work hours, for approximately 92% of the time. According to INS Policy, AUO overtime work is work that cannot be completed the next day, cannot be taken home, is not administrative in nature, and cannot be accomplished by another employee. Additionally, the requirement to work AUO is definite, official, and

special. The work described by the BPAs in the paralegal section does not meet these policy requirements.

B. The Payment of AUO to AFO BPAs and AFO management officials is inconsistent with 5 C.F.R., Sections 550.151 - 153, and Sections 550.161 - 162.

As noted above, 5 C.F.R. Part 550 contains Federal guidelines for implementing AUO.

5 C.F.R. § 550.151 provides that “An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart... to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty.”

5 C.F.R. § 550.153(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.... Moreover, “[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(b) provides that “In order to satisfactorily discharge the duties of a position referred to in Sec.550.151, an employee is required to perform substantial amounts of irregular or occasional overtime work.”

5 C.F.R. § 550.153(c) provides that “[t]he words in Sec. 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.”

5 C.F.R. § 550.153(d) provides that “[t]he words ‘circumstances which require him to remain on duty’ as used in § 550.151 mean that:

(1) The employee is required to continue on duty in continuation of a full daily tour of duty or that after the end of his regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event. Performance of only call-back overtime work referred to in § 550.112(h) does not meet this requirement.

(2) The employee has no choice as to when or where he may perform the work when he 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 regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in his working hours, as when in a travel status, that he may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.”

5 C.F.R. § 550.161- Responsibilities of the agencies, states:

“The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for:

(a) Fixing tours of duty; ordering employees to remain at their stations in a standby status; and placing responsibility on employees for remaining on duty when required by circumstances.

(b) Determining, in accordance with section 5545(c) of title 5, United States Code, and this subpart, which employees shall receive premium pay on an annual basis under § 550.141 or § 550.151. These determinations may not be retroactive.

(c) Determining the number of hours of actual work to be customarily required in positions involving longer than ordinary periods of duty, a substantial part of which consists of standby duty. This determination shall be based on consideration of the time required by regular, repetitive operations, available records of the time required in the past by other activities, and any other information bearing on the number of hours of actual work which may reasonably be expected to be required in the future.

(d) Determining the number of hours of irregular or occasional overtime work to be customarily required in positions which require substantial amounts of irregular or occasional overtime work with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty. This determination shall be based on consideration of available records of the hours of irregular or occasional overtime work required in the past, and any other information bearing on the number of hours of duty which may reasonably be expected to be required in the future.

(e) Determining the rate of premium pay fixed by OPM under § 550.144 or § 550.154 which is applicable to each employee paid under § 550.141 or § 550.151; or, if no rate fixed under § 550.144 or § 550.154 is considered applicable, proposing a rate of premium pay on an annual basis to OPM.

(f) Reviewing determinations under paragraphs (b), (c), (d) and (e) of this section at appropriate intervals, and discontinuing payments or revising rates of premium pay on an annual basis in each instance when that action is necessary to meet the requirements of section 5545(c) of title 5, United States Code, and this subpart.”

5 C.F.R. § 550.162(c) (1)-(2) provides that “[a]n agency may continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151:

(1) For a period of not more than 10 consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of premium pay on an annual basis, and for a total of not more than 30 workdays in a calendar year while on such a temporary assignment.

(2) For an aggregate period of not more than 60 prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which premium pay on an annual basis is payable.

An agency may not continue to pay an employee premium pay on an annual basis under this paragraph for more than 60 workdays in a calendar year.”

Investigative Findings

The AFO personnel interviewed disclosed that as a general matter, BPAs worked a regularly scheduled work shift from 0700 to 1500 hours, Monday through Friday, with two attached AUO hours each day. The interviewed BPAs consistently described their AUO hours as any work that carried over past the end of their regularly scheduled work hours/shift and had to be completed prior to departing.

CBP-IA agents learned that on October 6, 2013, a BPA was assigned to the San Diego Sector AFO to begin his/her two-year temporary detailed assignment. A review of this BPA’s employee work schedule in COSS revealed that the BPA’s regularly scheduled work hours were from 0600 to 1400 hours, Monday through Friday. Per COSS records, this particular BPA claimed daily AUO work beginning at 1400 hours. The BPA’s regularly scheduled work hours were different from the other AFO BPAs, and this BPA routinely claimed AUO work hours from 1400 through 1500 hours. The AUO work claimed was during the time the other BPAs were working their regularly scheduled work hours executing assigned administrative duties associated with seizures. Administratively rescheduling this BPA’s hours of duty demonstrates that the type of AFO AUO work claimed by this BPA was controllable and not irregular or occasional

overtime work. It appears this BPA's regularly scheduled works hours were modified to avoid transportation problems, i.e., traffic.

CBP-IA agents later discovered that on November 3, 2013, a BPA Alternate SPS's work schedule was changed from 0700 - 1500 to 0600 – 1400 hours. Per COSS T&A records, the BPA Alternate SPS routinely performed AUO work starting at 1400 hours. AUO work by its very nature involves overtime, and while it can be anticipated that overtime will be worked, its exact schedule and circumstances typically cannot be ascertained beforehand, nor readily predicted or regulated. The administrative rescheduling of two BPAs' work schedules suggests that the AFO AUO hours were definitely controllable, were clerical or administrative, and were not irregular or occasional overtime hours. Also, this second case of administrative rescheduling indicates that the AUO hours credited can be easily scheduled in advance, and that the hours in question do not involve independent investigative or other administratively uncontrollable work.

Changes in a tour of duty made to achieve an early arrival to the workplace to accommodate a carpool, or to avoid transportation problems, are merely for the employee's personal convenience and benefit; they are not required for official reasons.

The BPA positions at the AFO are considered temporary detail assignments. This was indicated in a memorandum dated August 22, 2013, from Paul A. Beeson, Chief Patrol Agent (CPA), San Diego Sector, to all BPAs in the San Diego Sector. The subject of the memorandum was "Detail to San Diego Sector Asset Forfeiture Office." The purpose of the memorandum was to solicit qualified BPAs "interested in a temporary detail not to exceed two years" to the AFO. CPA Beeson listed the primary duties to include, but not be limited to "processing seized property, dealing with contracted services, conducting investigations, participating in training events, timely management of case work, answering telephones, and maintaining accurate up-to-date information in databases and records." The detail to the San Diego Sector AFO is for more than 10 consecutive prescribed workdays and does not warrant premium pay on an annual basis.

BPAs at the AFO work with civilian personnel that do not earn AUO and do not currently perform any overtime work. Both the BPAs and the civilian personnel perform the same types of duties; however, during the time in question, the civilian personnel worked 80 hours a pay period with no overtime, and the BPAs worked 80 regular work hours with an additional approximately 20 hours of AUO, while performing the same duties as the civilian personnel.

According to OPM, an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work, should not receive AUO pay. This applies to the San Diego Sector AFO.

C. The payment of AUO to AFO BPAs and AFO management is in violation of 5 U.S.C. sec. 5545(c) (2) – Night, standby, irregular, and hazardous duty differential.

5 U.S.C. Section 5545(c) (2) provides, in pertinent part, that “an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis....”

Documentation in this investigation showed that (1) overtime work existed, i.e., the employee performed work in excess of the overtime standards—generally eight (8) hours in a day or 40 hours in a week; (2) overtime pay had been approved by the employee’s supervisor or another designated agency official; and (3) an overtime pattern existed, i.e., indicating that overtime work had been performed at the same time each day or each week over an extended period of time. Therefore, unless there is convincing evidence to the contrary, one can reasonably conclude that the work was not irregular or occasional in nature and was not properly compensated by payment of AUO pay. The following information supports the noted violations of the law, rules, policies, and regulations.

Investigative Findings

The AFO work environment as a whole must be considered. The documented evidence suggests that the daily work at the AFO is controllable and administrative in nature mostly because a large majority of the work operations are scheduled, e.g., transporting high-risk property to the OFO CBP vault, picking up seized property at various field stations (“milk runs”), and meeting with contracted personnel, who handle the seized vehicles. Other duties conducted at the AFO are running computer checks (criminal), sending out notices, working on petition investigations, and inputting data into SEACATS.

Per the BPAs, their AUO hours worked were a continuation of their daily duties, because their daily duties were time sensitive and had to be completed before the next day. However, according to the evidence gathered, it would have been acceptable for a large majority of these duties to be accomplished the next day and by another employee if needed. The two hours of AUO worked and claimed each day should not be paid as AUO. According to the law and policy, these activities are not AUO-qualifying work.

Supervisors interviewed said they do not require the BPAs to work a 10-hour day, and all supervisors said they follow the motto “claim what you work and work what you claim.” They acknowledged that all BPAs were aware that to claim 25% AUO pay an employee had to average annually approximately two hours of daily AUO.

The supervisors confirmed that the BPAs' regular works hours at the AFO were from 0700 to 1500. They acknowledged that BPAs could use AUO hours to accomplish their duties when the work hours could not be controlled administratively. Supervisors stated the BPAs received AUO pay for overtime worked after their regular eight-hour shift because the BPAs performed duties that necessitated their staying beyond the end of their regular shift. Supervisors verified that BPAs did remain at their desks sometimes after their regular eight-hour shift because they were running records checks and processing seizures that had just been transported to the AFO from the field.

It should be noted that the AFO cannot predict when seizures will take place in the field, but the AFO as a whole is a central and stationary unit established for the very purpose of processing seizures brought to the AFO by field elements or picked up by AFO personnel from the field elements and taken to the AFO during the AFO's working hours. The staff at the AFO is there for the purpose of processing field seizures. The processing takes place at the AFO and does not involve the "find and apprehend" duties that field/line BPAs perform. The seizure process takes place at the AFO by the BPAs and civilian personnel on duty during the AFO's regular duty hours and, if not completed, is finished during subsequent workdays. The staffing at the AFO has taken into account the manpower needed to accomplish the processing of seized property. But what is important here is that the processing itself is an activity that can be administratively controlled.

Work activities and other related occurrences that are not the result of compelling circumstances do not qualify for AUO compensation and are not creditable for determining eligibility for AUO. Some examples of work that does not qualify for AUO would be arriving early or departing late from the office without official cause or sanction. This would include situations in which the employee extends his/her workday to complete work in the office. Also included are situations in which the employee has the latitude to vary the arrival and departure times of a regular eight-hour workday to better accomplish a given objective. Some specific examples would be (1) changing a tour of duty to achieve an early arrival or late departure from the worksite for personal reasons, and (2) remaining late at the office to accomplish work that could be performed during regular work hours.

For an employee to be approved to receive AUO pay, a determination must be made by the immediate supervisor, or by a higher level supervisor or manager, that an employee has work assignments that frequently require unscheduled overtime work that cannot be controlled, that the AUO hours reported by the employee are actually worked, and that therefore the employee may earn a specified percentage of AUO annual premium pay. This determination is to be documented on a certification form and was documented by supervisors and higher level supervisors.

Based on the evidence, the AUO work at the AFO is improperly being credited as irregular or occasional, and either the rate of AUO pay must be revised or the eligibility for AUO pay must be discontinued, in order for the agency to meet legal and/or regulatory requirements.

Furthermore, according to INS Policy, the following criteria and conditions govern the designation of positions for AUO coverage. AUO work:

cannot be completed the next day; cannot be taken home; schedule cannot be adjusted; is not administrative in nature; cannot be accomplished by another employee; requirement is definite, official, and special; requirement is at least three (3) hours; requirement is more than once a week; and requirement continues frequently. (AM 00)

The AUO overtime work at the AFO can be completed the next day and accomplished by another employee if needed. The AUO work described by the BPAs in their interviews does not meet all of these policy requirements.

D. Issues

(1) The San Diego Sector AFO did not Ensure that Eligibility Criteria and Payment of AUO were in Compliance with Applicable Regulations

Premium pay under DOJ Order 1551.4A – Administratively Uncontrollable Overtime Pay, may be paid to eligible employees assigned to the certain classes of positions listed in Appendix 1 of the Order. The BPA position is listed as one of those positions that has been determined to generally meet the criteria set out in 5 C.F.R. § 550.153. However, it has been noted in the Order and in the OBP memorandums that mere occupancy of an authorized position does not qualify an employee for AUO pay. An employee qualifies by performing overtime work which meets the full requirements of 5 C.F.R. § 550.153.

The investigation revealed that BPAs and civilian personnel described the BPAs' daily duties and duties worked during AUO hours as being the same type of duties. Per the BPAs, their AUO hours worked were a continuation of their daily duties because their daily duties were time sensitive and had to be completed. However, the investigation revealed the duties in both the paralegal section and the seized property section could be accomplished the next day or at a later date or during normal working hours, and it was not necessary to extend the work day an additional two hours, as was done. Examining records, running computer checks, sending out notices, entering data into SEACATS, and the other duties performed during AUO hours worked could have been completed during regular duty hours, thus such work did not qualify for AUO compensation. Most of the duties of the seized property section are scheduled events during work hours. Any unscheduled or unpredictable event that required BPAs to work overtime hours was rare or non-existent, and the AUO hours claimed were not substantially irregular or occasional overtime hours. The additional two hours of AUO worked and claimed each day should not have been compensated as AUO. Late departure from the AFO so that an employee may continue the work he or she was performing during his or her regular duty hours does not make that continued work

AUO work. The BPA's overtime work at the AFO, described by AFO personnel and according to law and policy, is not AUO-qualifying work.

5 C.F.R. § 550.151 clearly states "An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart... to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty."

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

5 C.F.R. § 550.153(b) provides that "In order to satisfactorily discharge the duties of a position referred to in Sec.550.151; an employee is required to perform substantial amounts of irregular or occasional overtime work.

Additionally, the OPM guidance on AUO lists examples of AUO pay authority abuses. One example of AUO abuse was payment of AUO pay to an employee who almost always worked in a supervised office environment and did not perform independent investigative or other administratively uncontrollable work. Another example was the crediting for AUO pay hours of work that was clerical or administrative in nature, could easily be scheduled in advance, and did not involve any independent investigative or other administratively uncontrollable work. Another abuse was the continuation of AUO pay for more than 10 consecutive prescribed workdays for an employee on temporary assignment performing only regularly scheduled administrative duties.

The head of an agency (or his or her designee) is responsible for determining which employees shall receive AUO pay, consistent with law and applicable OPM and agency regulations. These AUO coverage determinations must be reviewed at appropriate intervals, and AUO pay must be discontinued if the employee is no longer entitled to AUO pay.

5 U.S.C. sec. 5545(c) (2) provides, in pertinent part, that "an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis..."

5 C.F.R. § 550.151 provides that "An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart...to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty."

According to DOJ Order 1551.4A – Administratively Uncontrollable Overtime Pay, the position of a BPA is authorized to receive premium pay. AUO pay is authorized under the following criteria:

a. The position must be one in which the hours of duty cannot be controlled administratively, e.g., by hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required.

b. In order to satisfactorily discharge the duties of the position, its occupant is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:

(1) A substantial amount of irregular or occasional overtime work means an average of at least three hours a week of that overtime work.

(2) This irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.

(3) 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 minimum requirements under paragraphs (2) a and b above.

c. The employee's responsibility for remaining on or returning to duty when required by circumstances must be a definite official and special requirement of his position. The employee must remain on or return to 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.

d. The circumstances which require an employee to remain on or return to duty permit the employee no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty or resumes duty in accordance with a prearranged plan or an awaited event. (75)

It appears that AFO BPAs have improperly received AUO pay and were not qualified to receive it. To receive AUO pay an employee must perform 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. According to the evidence gathered in the investigation, BPAs at the AFO were being paid AUO pay for work that was customary and routine work duties and work duties that were primarily administrative in nature.

(2) Previous Guidance on Administratively Uncontrollable Overtime Disregarded

On January 14, 2008, David V. Aguilar, then Chief of OBP, issued a memorandum to all Sector CPAs on the following subject: "Use of Administratively Uncontrollable Overtime (AUO) at Checkpoints." Checkpoints are staffed by BPAs and while the memorandum addressed issues in context of the checkpoint, it also addressed basic procedures and expectations for application of AUO.

The memorandum also provided four criteria for justifying the approval of AUO premium pay for a position as found in the law. The memorandum stated all four criteria must be met in order to provide an employee with AUO pay and was not just limited to checkpoint operations. In summary, the four criteria were: (1) The hours of duty cannot be controlled administratively, (2) Substantial amounts of overtime are required, (3) The employee is responsible for recognizing, generally without supervision, when to remain on duty or return to work, and (4) There must be a definite basis for anticipating that such requirements will be ongoing. In criteria number three, the following statement was made: "The reasons for remaining on duty are inherently related to continuance of the duties. Continuance of duties might include, for example, following through with an enforcement action. However, 'continuation of duties' does not include administratively controllable situations..." Additionally, criteria number three states "If an employee must continue work on an infrequent and irregular basis because of operational needs, that irregular overtime would be compensated as AUO since no other form of premium pay is applicable to such irregular overtime. However, if such continuation of infrequent work becomes more than irregular and there is a discernible pattern of work assignments then the Sector Chief Patrol Agent should review the hours to determine if they are administratively controllable by scheduling."

The memorandum also directed all Sector CPAs to immediately review the method of compensation used for payment for work in excess of eight hours in a day, particularly at checkpoints, and ensure OBP employees were properly compensated for performing work. The Sector CPAs were to accomplish these goals while monitoring costs and minimizing questions about premium and overtime pay.

Based upon the documented evidence and witness testimony, it is evident that the regular and consistent addition of two AUO hours to the regularly scheduled eight-hour day implies that the hours of duty are administratively controllable by management. Based on the information collected, the work performed during AFO AUO appears to be comprised of routine duties, and the hours required for its performance could have been controlled by hiring additional personnel or compensating the BPAs for overtime through a pay mechanism other than annual AUO pay.

On December 10, 2012, Michael J. Fisher, Chief, OBP, issued a memorandum to all CPAs and all Division Chiefs. The purpose of the memorandum was to emphasize and summarize existing guidance regarding the administration and management of AUO. The guidance contained in the memorandum was derived from current law, regulation, policy, and procedure that is applicable to the OBP. Chief Fisher made reference to the INS AM Section 1.3.103, OPM AUO guidance, and DOJ Order 1551.4A. Chief Fisher stated DOJ Order 1551.4A served a dual purpose which was to (1) implement AUO as the primary premium pay for the OBP and (2) "establish policy and procedures governing the payment of AUO."

Included in the memorandum were four specific criterion that a position must meet to be authorized and deemed eligible for payment of AUO as outlined in 5 C.F.R. § 550.153:

(1) The position must be one in which the hours of duty cannot be controlled administratively, e.g., by hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required.

(2) In order to satisfactorily discharge the duties of the position, its occupant is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:

a. A substantial amount of irregular or occasional overtime work means an average of at least three hours a week of that overtime work.

b. This irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.

c. 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 minimum requirements under paragraphs (2) a and b above.

(3) The employee's responsibility for remaining on or returning to duty when required by circumstances must be a definite official and special requirement of his position. The employee must remain on or return to 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.

(4) The circumstances which require an employee to remain on or return to duty permit the employee no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty or resumes duty in accordance with a prearranged plan or an awaited event.
(Memorandum 12)

Chief Fisher went on to state that "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 pay is the appropriate compensation for any irregular or occasional overtime work."

Based upon the documentary evidence and witness testimony, it is evident that the regular and consistent addition of two AUO hours to the regularly scheduled eight-hour workday implies the duty hours are administratively controllable by management. Based on the information collected, the work performed during AFO AUO appears to have been comprised of routine duties, and the hours required for its performance could have been controlled by hiring additional personnel or rescheduling the hours of duty.

5. DESCRIPTION OF ACTION TAKEN OR PLANNED

CBP intends to take the following actions:

- The function of Asset Forfeiture Specialist will be expeditiously deauthorized from AUO, nationwide. Employees performing this function will have their overtime compensated via the applicable and appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward. Additionally, CBP is also exploring the potential of having these functions carried out by job series other than GS-1896 Border Patrol Agents.
- 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.