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**Administratively Uncontrollable Overtime
Case Summary**

Elam, Jim; OSC File No. DI-13-2853

McLoughlin, Daniel; OSC File No. DI-13-3516

Customs and Border Protection, Office of Border Patrol, San Diego Sector, Asset Forfeiture Office, San Ysidro, California

The whistleblowers, Jim Elam and Daniel McLoughlin, disclosed to OSC that Border Patrol agents (BPAs) detailed to the Asset Forfeiture Office improperly received Administratively Uncontrollable Overtime (AUO) for performing duties that do not qualify for AUO under the governing laws and regulations. See 5 C.F.R. § 150.151-154. In addition, Messrs. Elam and McLoughlin alleged that the BPAs routinely claimed two hours of AUO per day, but were not actually working two full hours. On July 29, 2013, OSC referred these allegations to former Secretary of Homeland Security Janet Napolitano to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). On February 20, 2014, OSC requested a supplemental report regarding the allegation that BPAs were not working the hours claimed for AUO.

After receiving OSC's referral, former Secretary Napolitano tasked the CBP Office of Internal Affairs (IA) with conducting an investigation of Messrs. Elam and McLoughlin's allegations and designated then-Acting CBP Commissioner Thomas S. Winkowski as the official responsible for submitting the agency reports to OSC. Acting Commissioner Winkowski submitted the initial agency report on January 23, 2014, and the supplemental agency report on July 9, 2014. Pursuant to 5 U.S.C. § 1213(e)(1), Messrs. Elam and McLoughlin provided comments on the agency reports.

CBP substantiated the allegation that BPAs assigned to the AFO were claiming approximately two hours of AUO per day for work that was controllable and administrative in nature, and thus, did not qualify for the receipt of AUO. The agency concluded that the BPAs were generally performing the same duties as the non-BPA employees, who were not eligible for AUO. These duties, such as acquiring seized property from field stations, processing seized property paperwork, entering data, and completing case work, were performed in a supervised office environment and were, in large part, scheduled in advance. The agency also concluded that during the hours claimed as AUO, the BPAs were simply continuing daily duties, most of which could have been accomplished the next day or by another employee. Therefore, BPAs at the AFO had improperly been receiving AUO pay. CBP did not substantiate the allegation that BPAs were not working all of the hours claimed for AUO pay.

Based on the agency determination that the operational circumstances at the AFO did not justify the use of AUO to accomplish the agency mission, CBP immediately de-

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authorized the function of asset forfeiture specialist from AUO nationwide. The agency also committed to additional corrective actions, including an internal AUO eligibility review of CBP positions, issuing a revised AUO directive, cooperating with the Government Accountability Office DHS AUO audit, and exploring comprehensive pay reform through legislation. These corrective actions are ongoing.

In his comments, Mr. McLoughlin indicated that non-BPA employees performing identical work at the AFO did not receive overtime pay, and thus, it would be more cost effective for CBP to staff the AFO with additional non-BPA agents rather than with detailed BPAs. He reiterated his position that the BPAs were not working the full two hours claimed for AUO, and considered AUO an entitlement, whether there was work to be completed or not. As evidence AUO was viewed as an entitlement, Mr. McLoughlin pointed out that all the BPAs detailed to the AFO chose to terminate their details early, when they learned that AUO was de-authorized.

Mr. Elam also remained steadfast in his claim that BPAs were not working all of the hours they claimed in order to be paid AUO. And, the overtime that was actually worked by the BPAs was not legitimate, as it was not based on need, but on their desire to receive the overtime pay they believed they were entitled to. He indicated that BPAs working as asset forfeiture specialists have in large part chosen to be reassigned rather than be de-certified from AUO. Mr. Elam contends that much of the overtime worked at CBP is unnecessary, whether paid as AUO or another overtime regulation. Mr. Elam also stated that Secretary Johnson's decision to suspend AUO for up to 900 employees showed tremendous courage and leadership, but questions why none of the employees abusing AUO were held accountable through disciplinary action.