

February, 12<sup>th</sup>, 2014



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

The Honorable Carolyn N. Lerner  
Special Counsel  
Office of Special Counsel  
1730 M Street #300  
Washington, DC 20036-4505

Re: OSC File #DI-13-2853

Dear Ms. Lerner,

I have reviewed the U.S. Customs and Border Protection (CBP) Office of Internal Affairs (IA) investigation of my whistleblower disclosure concerning the abuse of Administratively Uncontrollable Overtime (AUO) by agents detailed to the Office of Border Patrol (OBP), San Diego Sector (SDC), Asset Forfeiture Office (AFO). My responses are as follows.

As to IA not being able to substantiate my claim that agents were not working or leaving early during the two hours they were being paid for AUO, I maintain that if I had the time and the authority to do so, there is no doubt in my mind I could have proven my claim beyond a reasonable doubt. Following are examples of the activities I witnessed firsthand, by both agents and supervisory agents, both during their regular eight hour shift and their two hours of AUO;

- Straggling in five to ten minutes late.
- Arriving late then spending the next thirty minutes or more gathered together around someone's work station engaged in raucous conversation. The noise and laughter would be so loud it was a distraction to other AFO staff who were trying to get work done.
- This gathering typically concluded with the agents all loading into large, gas-guzzling SUV's and Humvees and heading out to Starbucks for their morning coffee.
- These coffee breaks sometimes evolved into staying for breakfast – the longest of which I personally timed at one hour and fifteen minutes.
- Entertaining themselves on their Smart Phones by playing games or watching videos.
- Entertaining themselves by surfing or shopping on the internet.
- Reading the newspaper.
- Working on college courses.
- Leaving an hour and a half into their AUO and rounding it up to two hours.

As to IA substantiating my claim that the work performed by agents at the AFO did not constitute or qualify as AUO, I would have expected nothing less. It clearly is not.

As to the AFO management's claim that – even though it might not have fit the definition of AUO – the overtime work performed and claimed by agents was necessary and legitimate, I remain steadfast in my opinion that it is neither. As the most tenured and experienced person at

the AFO, I state unequivocally that the overtime “worked” was not based on need but rather it was entirely at the whim and desire of the agents and done so to pad their paychecks.

I would like to add that the IA report only goes back to 2012. I have been at the AFO since March of 2008 – nearly six years. In all that time there has never been a single event – not one – that would merit an agent having to stay and work AUO. Yet if one checked the pay records during this period I am confident one would find that AUO is claimed by 90 percent or more of the agents 90 percent or more of the time.

As to actions taken by CBP, i.e. decertifying AUO of agents detailed to Headquarters, Training Centers, and AFO’s throughout the entirety of OBP, that greatly exceeded my expectations. What I did not expect however was what happened as result. The agents detailed here were allowed to simply walk off the job rather than “take a cut in pay” (as they perceive it). I lost four of my six staff members. The immediate impact was that each of my two remaining non-agent paralegals had their workload increase by 67% and my workload was increased by 167%. The Seized Property Specialists (SPS) lost three of five staff. The two remaining non-agent SPS’ had their workload increase 150%. These are unsustainable levels.

I feel that the remaining non-agent staff may incur additional collateral damage. Right now the biggest issue here in San Diego is what to do about AFO staffing. They haven’t involved me in the discussions but from what I hear second-hand they are exploring two options.

One would be to hire actual Paralegal Specialists and Seized Property Specialists and do away with the practice of detailing agents to fill those billets. This scenario is how it should have been all along. Since we cap out at GS-11 (as compared to the agents at GS-12) the savings in base pay alone would be over a \$100,000.00 a year. Plus we’d have the benefit of a permanent staff vice the constant change of personnel that occurs with two year details. This would also eliminate any overtime abuse altogether. Unfortunately, I don’t think this is the most likely option.

The other option is to close this office down and consolidate us with CBP’s San Diego Fines, Penalties, and Forfeitures Office. This would negatively impact our staff by causing us a longer, high traffic, more costly (toll roads) commute, and having less favorable workstations (going from new offices to old cubicles). This may sound petty but it goes back to the non-agents not doing anything wrong yet still coming out worse off nonetheless.

I also want to make it understood that the agents detailed here came of the own volition. They didn’t merely volunteer for this assignment but had to actively request to be given this detail. They were chosen from a pool of ten to fifteen applicants. Each paralegal applicant was interviewed by me and a supervisory agent. Although I could not specifically discuss AUO I made it clear to them that this would be a purely administrative assignment performed during normal business hours. The agents should not have been allowed to walk away and go back to their station until or unless they had either completed their two year detail or they had a suitable replacement.

To my knowledge the Agency took no disciplinary action against any of those found to be abusing AUO. I find it ironic that the wrongdoers basically got away with it and the only people being adversely affected are the whistleblower and the non-agent staff. And there is no doubt in my mind that the agents will simply continue their abuse of AUO at their stations. Why else would they go back?

I would also like to remark on a February 4<sup>th</sup>, 2014, conference call that I participated in. Once a month, the Assistant Chief (AC) of Asset Forfeiture, in our DC Headquarters, will have a national conference call with the twenty Sector Asset Forfeiture Officers. Of course the biggest topic was the decertification of AUO by agents detailed to the AFO's, including the Asset Forfeiture Officer him or herself. I am almost certain that the AC knows that I am a whistleblower. He also knew that, as I usually do, I was participating in this particular call. What I don't know is if the other Asset Forfeiture Officers knew that a whistleblower was a party to the discussion. What I heard does not surprise me. In fact it enforces what I have long contended – agents everywhere abuse AUO and will continue to do so as long as the opportunity exists.

I heard the Asset Forfeiture Officers from four different Sectors tell the AC that so as to avoid being de-certified they have had themselves re-assigned to a different type of detail and had their AFO responsibilities re-classified as a “collateral duty.” I could literally see the AC squirming uncomfortably because he knew that I would pick up on this. But again, this goes to show the length agents will go to, and be allowed to go to, to continue their abuse of AUO.

I believe AUO abuse is endemic throughout the agency. In addition to what I've witnessed over the years here at the AFO, there are two other assignments staffed by detailed agents that I have worked in close physical proximity to – Sector Prosecutions and Emergency Preparedness - and I have witnessed the same thing. Based on what I've personally seen, the agents assigned to those details do not have enough work to do to keep them gainfully employed for eight hours, much less the additional two hours of AUO they regularly claim.

I have watched the two most recent Congressional hearings on AUO abuse. The Agency and union trot out the same cast of characters. And those persons prop up the same two straw men, or rather straw agents, that they always have. No matter whether on patrol or working in an office, no matter whether on full duty or limited duty, no matter whether a trainer or a trainee, no matter if assigned to the high-activity southwest border or the low-activity northwest border - at the end of their eight hour shift all 21,000 agents either have an hour long commute or are actively engaged in a smuggling event.

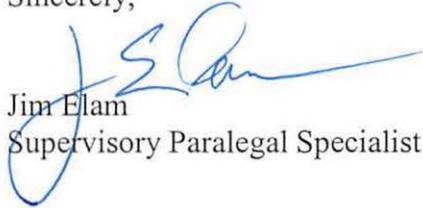
One of the straw agents is created by Agency management's steadfastness in having only three shifts. I believe they do this to create a need for overtime where none really exists. As a twenty-three year military veteran I have managed quite a number of watch bills that provided for 7/24 coverage. It is a very simple thing to go from three shifts to four and you absolutely do not lose anything in the way of coverage as the Agency and union contends.

The other straw agent is the one unlucky enough that every day, precisely at the end of his or her eight hour shift, a smuggling event occurs requiring exactly two hours for them to quell. Come on. Really? I honestly believe that an event qualifying and necessitating AUO occurs fewer than five percent of the time yet it is claimed 90 percent of the time.

Finally, I would like to remark on the January 29, 2014, letter from the National President of the American Federation of Government Employees, AFL-CIO, Mr. J. David Cox, Sr. to DHS Secretary Jeh Johnson. In response to his decision to "unilaterally suspend" AUO "for up to 900 employees," Mr. Cox writes, "I am outraged" and called the act "one of extreme bad faith." I, however, believe Secretary Johnson's actions showed tremendous courage and leadership. Bravo Zulu, Secretary. *Et facta est lux*. I look forward to serving in your command.

I also extend my thanks and gratitude to the OSC personnel, particularly attorneys Kathryn Donahue and Johanna Oliver, who have helped guide me through this endeavor. Their professional and courteous assistance was invaluable.

Sincerely,



Jim Elam  
Supervisory Paralegal Specialist