



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

October 22, 2014

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) supplemental report and investigation based on my comments regarding their original investigation into my disclosure of abuse of Administratively Uncontrollable Overtime (AUO) by agents detailed to the Asset Forfeiture Office (AFO) in San Diego Sector.

That that report was the end product of ten additional months of investigation is quite telling. The investigator found what he wanted to find – nothing of substance. Five minutes after I sat down for the first time with the IA investigator assigned to my case I could tell where his allegiances lay. He was scolding and antagonistic toward me. Rather than interviewing me as a cooperating witness, he interrogated me like I was a hostile suspect. He made a comment to the effect that I was wasting my time (thereby wasting his time). That these AUO allegations were old hat and had been investigated before. He also espoused that it wasn't the agent's fault but rather congress' for burdening them with such an untenable and unfair overtime system. It was apparent he did not want to find any instances of abuse and I congratulate him on his success. (Is it relevant that CBP IA is itself under investigation for AUO abuse?). Fortunately, the last line of the report framed the issue quite nicely. "The common theme was the AFO BPAs always seemed to struggle with finding AUO work that could not be completed before the end of their scheduled tour of duty."

I still and always will maintain that the overtime hours the agents were paid for was neither justified nor operationally necessary – as AUO or any other form of overtime pay. And I still maintain that given the time and the authority *I* could investigate and substantiate a majority of my allegations.

I am hesitant to submit any further comments lest his issue drag on beyond my stamina to continue to fight the battle. However, I do feel it is important for OSC and the public to know what has happened in the months since the Secretary and the Commissioner implemented the

new AUO policies. When AUO was decertified for agents assigned to the AFO on January 28, 2014, astoundingly, they were allowed to walk away from their duties here without replacements and go back to their stations. AFO staffing went from sixteen personnel to seven practically overnight.

One might reasonably ask, "Who was going to do all the work that was assigned to the agents?" The answer was it was placed squarely on the backs of the remaining three paralegals and two seized property specialists (SPS) – basically the non-agents who had did nothing wrong. Included in that small group were the two whistleblowers. One might wonder if this was some form of reprisal or retaliation. One would have to keep wondering because there's no way to prove it.

One might also reasonably think that if the paralegal staff went from seven to three and the SPS staff went from five to two, the five staff remaining would need to work tremendous amounts of overtime just to keep the AFO ship afloat. After all, the agency maintained that even though the AUO paid to the agents here may not have necessarily been within the definition of what constitutes AUO, it was nonetheless necessary overtime based on operational needs. So one might ask, "How many hours of overtime were the non-agents allowed to work under these incredibly difficult circumstances?" The answer is, "Zero. Zilch. Nada. None." In a perplexing cause and effect correlation, the operational need for overtime left when the agents did. And things continued to get worse.

We lost our missionary support assistant in the spring and he was not replaced. Some of his assignments, like those of the departed agents, were placed on the by then already overburdened backs of the remaining five employees – further increasing the need for overtime. But not to the point we were allowed to work any.

And then things continued to get worse. In May we lost another paralegal, this time due to health issues. Now there was just two of us (back in January we had seven). The need for overtime was even more obvious. It was also obvious we weren't going to be allowed any. Well, that's not entirely accurate. I was offered and did agree to work 47 hours of "compensated" time. But those hours were spent on compiling statistical reports and analysis for use by Sector. It did nothing to alleviate our case load or rapidly growing backlog.

I was made aware that there was in fact a handful of agents who would be willing to be detailed to the AFO, eschewing their AUO. It made no sense to me why the agency let the remaining staff be placed in such an overwhelming situation when there was absolutely no need to. But they did. For about seven months.

Finally, in a July 29, 2014, memorandum from Sector, "Detail to San Diego Sector Asset Forfeiture Office – No AUO," the call went out. For the first time ever the announcement included the verbiage, "U.S. Customs and Border Protection policy has determined the duties performed at the AFO do not meet regulatory requirements for use and payment of

Administratively Uncontrollable Overtime (AUO). Therefore, agents selected for this detail will be decertified in accordance with SDC Standard Operating Procedures 51550-001. Upon detail completion, agents will be certified for payment of AUO once they return to a position authorized to earn AUO.” This solicitation netted us three agents, all of whom were detailed to the paralegal side of the house. They reported here on August 24, 2014. After some initial loss of productivity during their on the job training, the agents have become productive members of the staff. Their volunteering to be here is greatly appreciated by the permanent staff although I have heard that some of their fellow agents compare them to scabs who have crossed a pick line.

Once they were trained enough to be functional, the agents being here was a great help. However, their being here did not help at all with the tremendous backlog that had piled up over the previous seven months. What it did do was to at least keep us from falling any further behind. Then, for some reason, the purse strings were opened and money was found to allow myself and the other paralegal to work overtime.

Since September 11, 2014, I have been offered, accepted and worked a total of 65 hours of paid overtime. I am scheduled to work another nine hours tomorrow and eight on Sunday (October 18 and 19, 2014). I’m not sure how long this will continue. We’re told at the beginning of the pay period how much overtime we’re allowed. Working these hours allows us to chip away at the (still considerable amount of) backlog. And for reasons not explained, the SPS’ were not offered to work overtime – even though their situation is even more desperate than the paralegal’s.

The AUO decertification affected agents assigned to (nearly all) the other 25 five or so details within the San Diego Sector, not just the AFO. Sector regularly sends out email soliciting agents for these details. I noticed for the first time in an October 2, 2014, memorandum, “Detail to Force Options Training Branch,” the use of new verbiage, to wit: “Historically, personnel assigned to these duties have been *required* (emphasis added) to work an average of 16-18 hours of overtime per pay period. Volunteers can expect this to continue for the foreseeable future,” only now instead of AUO they’ll earn “FEPA (45-Act)” pay.

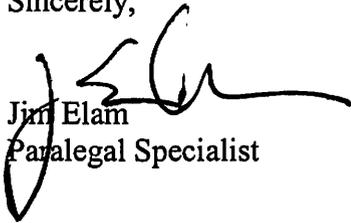
It appears to be the new norm as the same verbiage was used in, “Detail to San Diego Regional Coordination Mechanism Intelligence Group,” October 9, 2014, “Supervisory Border Patrol Agent Barracks Area Detail,” October 20, 2014, “Sector Border Community Liaison Agent Solicitation” October 20, 2014, and “Detail to San Diego Sector Transit Staging Area/Barracks 5,” which came out today. This is the same AUO pig, only hosed down and trotted out wearing a redder shade of lipstick.

My issue all along is not that the agents are working overtime that does not fit the definition of AUO. My contention is that this overtime is, by and large, totally unnecessary and unjustifiable. I don’t care what it’s called it’s still the same thing – a fraud perpetrated on the American taxpayer.

Overtime should be based on one thing and one thing only – operational need. This agency unfortunately appears intent on continuing the practice of basing it on their agent’s sense of entitlement to it.

I would like to end by saying I am very grateful for OSC attorney Joanna Oliver’s continued assistance in this matter. I would also like to thank and recognize our new (since December 2013) Asset Forfeiture Officer, Supervisory Border Patrol Agent Cami Espiritu. She, and the agents detailed here now, Diana Hinojosa, Tim McLaughlin, and Lee Miller, have work ethics and integrity their predecessors should take note of and emulate.

Sincerely,



Jim Elam
Paralegal Specialist



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

SDC 100/15.2.2-C

OCT 24 2014

MEMORANDUM FOR: Border Patrol Agents
San Diego Sector

FROM:  Paul A. Beeson
Chief Patrol Agent
San Diego Sector

SUBJECT: Detail to San Diego Sector Transit Staging Area/Barracks 5

San Diego Sector is currently soliciting agent memorandums for a temporary detail to the Transit Staging Area (TSA)/Barracks 5. Applicants must be non-probationary, detail oriented and possess a strong work ethic. The duration of this detail is not to exceed one year. The use of government-owned vehicles, for the purpose of reporting to duty, will not automatically be authorized.

Duties will include but are not limited to Officer in Charge of operations in the absence of the supervisor; liaison with Immigration and Customs Enforcement/Enforcement and Removal Operations, liaison with Office of Field Operations and management of the Alien Transfer Exit Program.

Memorandums must contain (1) U.S. Border Patrol Entered on Duty date; U.S. Border Patrol Academy graduation date; (2) Current duty assignment; (3) Last detail and date of completion; (4) Current station, sector, and national collateral duties and (5) Any relevant experience that would merit special consideration.

The workload at TSA often requires that personnel work overtime. While serving in this detail personnel will earn FEPA (45-Act) for any work required beyond a normal 8 hour day. Historically personnel assigned these duties have been required to work an average of 18 hours of overtime per pay period. Volunteers can expect this to continue for the foreseeable future. In the event that FEPA overtime is no longer required/available for any reason, volunteers will be allowed to terminate their detail and return to routine patrol duties.

Applicants will be scheduled for an interview. Memorandums of interest shall be submitted through official channels to Assistant Chief Patrol Agent Thomas L. Blanks by close of business Friday, October 31, 2014. Agents are also requested to forward an electronic copy of their memorandum to Program Manager Tracy F. Simpson at tracy.f.simpson@cbp.dhs.gov. Any questions regarding this assignment should be directed to Operations Supervisor Daryl R. Reed (619) 498-9793.