1300 Pennsylvania Avenue, NW
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FEB 0 9 2015

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 No. DI-14-0539

Dear Ms. Lerner:

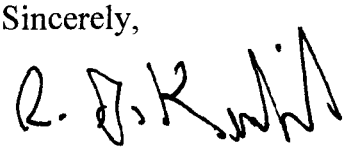
The enclosed report is in response to your referral of allegations that employees of the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), U.S. Border Patrol (USBP), El Centro Sector Headquarters, engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, and a gross waste of funds. The anonymous whistleblower alleged that sector employees conducting CrossFit instruction regularly claim Administratively Uncontrollable Overtime (AUO) but fail to perform duties that qualify for AUO. I am the designated official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213.

On December 9, 2013, OSC referred the above allegations and a request for an investigation to DHS Acting Secretary Rand Beers. The DHS Office of Inspector General received these allegations on December 10, 2013. The investigation was completed on January 8, 2015, and revealed that AUO paid to USBP agents for CrossFit instruction and related activities was inconsistent with Federal AUO regulations, and CrossFit instructors generally did not receive consistent guidance on AUO requirements.

The findings are included in the enclosed report. Effective January 28, 2014, CBP suspended the use of AUO for USBP employees engaged as full-time training instructors. At the time of the OIG review, the USBP was no longer using AUO to compensate employees for any work related to CrossFit.

If you require further information regarding this matter, please contact Philip Carpio in the Office of Chief Counsel at 202-344-2940.

Sincerely,



R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

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

OFFICE OF INSPECTOR GENERAL

Evaluation of Alleged AUO Misuse by U.S. Border Patrol Agents Engaged as CrossFit Instructors (OSC File No. DI-14-0539)

Homeland Security

January 8, 2015

OIG-15-20

HIGHLIGHTS

Evaluation of Alleged AUO Misuse by Border Patrol Agents Engaged as CrossFit Instructors (OSC File No. DI-14-0539)

January 8, 2015

Why This Matters

We conducted this evaluation in response to a whistleblower disclosure concerning employees in the U.S. Border Patrol's (USBP) El Centro Sector Headquarters in El Centro, California. The whistleblower alleged that Border Patrol agents detailed to the El Centro Sector Headquarters as CrossFit instructors claim administratively uncontrollable overtime (AUO), but fail to perform duties that qualify for AUO. Border Patrol agents also serve as CrossFit instructors in seven other Border Patrol sector headquarters.

For Further Information:
Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

Federal regulations allow agencies to pay AUO annually to employees in positions that require substantial amounts of irregular or occasional overtime work and in which the hours of duty cannot be controlled administratively. Employees must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of their duties, and of such a nature that failure to carry on would constitute negligence.

CrossFit is a fitness program that employs endurance and fast-switch strength movements as a form of physical conditioning. Eight USBP sectors include CrossFit classes in their physical fitness programs. Six of the eight sectors paid AUO to Border Patrol agents engaged as CrossFit instructors.

AUO paid to Border Patrol agents for CrossFit instruction and related activities, such as gym maintenance and class preparation, was inconsistent with Federal AUO regulations. The hours of duty for CrossFit instruction and related activities could have been controlled administratively. In addition, CrossFit duties were not so compelling that failure to complete those duties would have constituted negligence. USBP discontinued AUO payments for CrossFit instruction and related activities in January 2014.

This report contains no recommendations.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

January 8, 2015

MEMORANDUM FOR: The Honorable Stevan E. Bunnell
General Counsel
Department of Homeland Security

FROM: John Roth
Inspector General

SUBJECT: *Evaluation of Alleged AUO Misuse by U.S. Border Patrol Agents Engaged as CrossFit Instructors (OSC File No. DI-14-0539)*

The U.S. Office of Special Counsel (OSC) received a whistleblower disclosure concerning U.S. Customs and Border Protection's (CBP) U.S. Border Patrol (USBP) El Centro Sector Headquarters in El Centro, California. The whistleblower alleged that Border Patrol agents detailed to the El Centro Sector Headquarters as CrossFit instructors claim administratively uncontrollable overtime (AUO), but fail to perform duties that qualify for AUO. OSC indicated that Border Patrol agents serve as CrossFit instructors in at least eight other Border Patrol sector headquarters.

On December 9, 2013, OSC referred this allegation to Department of Homeland Security (DHS) Acting Secretary Rand Beers. The Department subsequently requested our assistance with this allegation and several other AUO-related allegations from other DHS components. We assembled a taskforce of auditors, program analysts, investigators, and attorneys to review these allegations. Given time constraints and limited resources, we determined that a limited-scope review of the components' use of AUO in 2013 and 2014 would yield the most useful results.

The attached final report contains the results of our evaluation on the alleged misuse of AUO by Border Patrol agents engaged as CrossFit instructors. Your office provided technical comments on an earlier version of this report, which we incorporated in this report as appropriate. We intend to publish this report on our website within 90 days of the date of this memorandum. We will issue the results of our evaluations of the alleged misuse of AUO at other components in separate reports.

Please call me with any questions, or your staff may contact John E. McCoy II, Deputy Assistant Inspector General for Audits, at (202) 254-4100.

Attachment

Summary of Results

AUO paid to Border Patrol agents for CrossFit instruction and related activities, such as gym maintenance and class preparation, was inconsistent with Federal AUO regulations. The hours of duty for CrossFit instruction and related activities could have been controlled administratively. In addition, CrossFit duties were not so compelling that failure to complete those duties would have constituted negligence. We do not believe that the CrossFit instructors we interviewed intentionally violated Federal AUO regulations. USBP discontinued AUO payments for CrossFit activities in January 2014.

Eight USBP sectors include CrossFit classes in their physical fitness programs. Six of the eight sectors paid AUO for CrossFit-related duties. These six sectors accounted for 1,447 of the AUO hours we reviewed; of the 1,447 AUO hours, 606 (42 percent) were clearly related to CrossFit activities.

Background

CrossFit is a fitness program that employs endurance and fast-switch strength movements as a form of physical conditioning. According to CBP, approximately 144 Border Patrol agents serve as CrossFit instructors in eight sectors: El Centro, El Paso, Del Rio, Laredo, Rio Grande Valley, San Diego, Spokane, and Tucson. Agents in all these sectors except Spokane and Tucson received AUO for CrossFit-related duties. Instructors generally lead CrossFit classes for other agents, yet each sector's CrossFit program is slightly different. For example, agents at some sectors are on 18- to 24-month details to instruct CrossFit classes; other sectors have agents that permanently instruct the CrossFit classes in addition to their border patrol duties. Please see appendix A for a description of each sector's CrossFit program.

According to an anonymous whistleblower, Border Patrol agents on detail as CrossFit instructors to the El Centro Sector Headquarters earn AUO "despite the fact that the extra hours they work are administrative, optional, and controllable and do not, therefore, fall within the definition of AUO." The whistleblower's disclosures are based upon personal observation during a training course at the El Centro Sector Headquarters. At that training, the whistleblower observed a supervisor of the CrossFit program present information about the workout classes. According to the whistleblower, one agent asked the supervisor if the

CrossFit instructors receive AUO. The supervisor responded that instructors claim 15 percent AUO in addition to their salary.

OSC reviewed the allegation and concluded, "there is a substantial likelihood that the information the whistleblower provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, and a gross waste of funds."

On January 27, 2014, DHS Secretary Johnson issued a memorandum suspending the use and payment of AUO for all employees engaged as full-time training instructors. AUO was subsequently discontinued for CrossFit instruction and CrossFit-related activities.

Relevant Regulations

According to title 5 of the Code of Federal Regulations (CFR) § 550.151, agencies are authorized to pay AUO annually "… to an employee in a position 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."

Per 5 CFR § 550.153(a), a typical example of a position meeting the AUO requirement "… is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it."

Furthermore, 5 CFR §550.153(c) defines what it means in §550.151 that an employee is "generally responsible for recognizing, without supervision, circumstances which require him to remain on duty:

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."

Relevant Policies

Section 1.3.103 of the Immigration and Naturalization Service (INS) Administrative Manual of January 2000 contains examples of situations that support the payment of AUO, instructions on certifying the percentage of AUO to be paid, and standards for documenting the overtime worked by USBP employees.

According to INS Administrative Manual, Section 1.3.103, the AUO percentage rate authorized may be 10, 15, 20, or 25 percent of the employee's rate of basic pay for positions that require:

- an average of at least three but not more than five hours a week of irregular or occasional overtime work—10 percent;
- an average of over five but not more than seven hours a week—15 percent;
- an average of over seven but not more than nine hours week—20 percent; and
- an average of over nine hours a week—25 percent.

Agents use the CBP Overtime Scheduling System to record the number of AUO hours they work each pay period. According to USBP guidance, employees are to use G-1012 forms to record and describe the tasks they perform during AUO duty hours; supervisors are to ensure that employees are performing AUO eligible work by reviewing the G-1012 forms every pay period (appendix B contains the G-1012 template).

Finding

The payment of AUO to Border Patrol agents for CrossFit instruction and related activities, such as gym maintenance and class preparation, was inconsistent with 5 CFR §550.151 and 5 CFR §550.153. The hours of duty for CrossFit instruction and related activities could have been controlled administratively. In addition, CrossFit activities did not require agents to remain on duty for compelling reasons inherently related to continuance of their duties, and of such a nature that failure to carry on would have constituted negligence. Although CrossFit-related duties were inconsistent with Federal AUO regulations, nothing came to our attention that caused us to believe that the CrossFit instructors we interviewed intentionally violated 5 CFR §550.151 and 5 CFR §550.153.

Summary of Evidence Obtained

AUO Documentation

We reviewed a judgmental sample of 154 G-1012 forms (2,031 AUO hours) from eight sectors that were completed by 71 nonsupervisory and supervisory Border Patrol agents engaged in CrossFit activities between January 13, 2013, and January 25, 2014. Six of the eight sectors paid AUO for CrossFit-related duties. These six sectors accounted for 1,447 of the AUO hours we reviewed in our sample. Of the 1,447 AUO hours, 606 hours (42 percent) were clearly related to CrossFit activities. Between January 13, 2013, and January 25, 2014, agents recorded AUO hours for CrossFit-related tasks such as:

- Class instruction;
- Sanitizing equipment;
- Gym inventory;
- Ordering equipment;
- CrossFit seminar;
- Maintenance;
- Course curriculum development;
- Instructor duties; and
- Supervising CrossFit instruction.

In our opinion, all CrossFit-related tasks were predictable and administratively controllable. In addition, we do not believe failure to remain on duty to complete any CrossFit-related tasks would have constituted negligence. As such, CrossFit instruction and related CrossFit tasks were not eligible for AUO compensation under Federal AUO regulations.

Employee Interviews

We interviewed 10 supervisory and 25 non-supervisory Border Patrol agents involved in the eight sectors' CrossFit programs. Based on these interviews, we concluded that:

- Border Patrol agents engaged in CrossFit activities generally did not receive consistent guidance on AUO requirements; and

- After AUO was suspended for full-time instructors, six sectors adjusted schedules so that agents serving as CrossFit instructors could continue to teach and receive AUO for non-CrossFit-related duties.

AUO Guidance

Agents engaged as CrossFit instructors did not receive consistent guidance for the use of AUO. In all sectors, some agents said they were provided written policies; others said they only received verbal guidance or no guidance at all. In the El Centro sector, seven of the eight nonsupervisory agents we interviewed did not recall any formal written guidance; a few of them received minimal verbal instructions, such as "only put down the hours you worked." (The eighth El Centro agent did not respond to the guidance question.)

When we asked agents in all sectors about the requirements for earning AUO, most could not provide an accurate or complete description of the requirements. For example, one agent said "whatever they are doing at the time can be considered AUO if they need more time." Another agent, whose shift ended at 1:00 p.m., reported that AUO is for "any work done after 1:00 p.m." Consequently, we do not believe the Border Patrol agents serving as CrossFit instructors we interviewed intentionally violated Federal AUO regulations.

Adjustment of Schedules

Agents in the El Centro, El Paso, Del Rio, Laredo, Rio Grande Valley, and San Diego sectors told us that CrossFit instruction was reduced from full- to part-time or collateral duty once AUO was suspended for full-time instructors — CrossFit instruction in the Spokane and Tucson sectors had always been a part-time or collateral duty. Agents in the six sectors that allowed AUO for CrossFit activities told us they stopped receiving AUO for CrossFit activities as of the suspension memo or a few weeks before the memo was issued. (Our review of G-1012 forms confirmed that agents did not claim AUO for CrossFit-related activities after January 28, 2014.)

Since January 2014, CrossFit instructors in El Centro, El Paso, Del Rio, Laredo, Rio Grande Valley, and San Diego generally spend about half of an 8-hour shift on CrossFit activities and the remainder on law enforcement activities in the field. It is our understanding that agents' part-time CrossFit activities have no effect on whether they may earn AUO for non-CrossFit activities on the same day. For example, if agents

are scheduled to teach CrossFit for 4 hours in the morning and then complete the remaining 4 hours of their shift at a border-crossing checkpoint, AUO could only be earned if the agents needed to stay beyond their 8-hour shift to complete a task that resulted from activity at the checkpoint.

Although the reduction from full- to part-time or collateral duties allowed the sectors' CrossFit programs to continue, some instructors told us that the suspension of AUO for CrossFit had a negative impact. For example, the reduction to part-time instruction resulted in a decreased instructor skill set, less time available for programming, and fewer classes. One agent explained that his program is surviving off volunteers and part-time agents.

Interview of Supervisor Named in the Whistleblower Disclosure

On January 2, 2014, we interviewed the supervisor named by the whistleblower in the allegation and obtained a written sworn statement. The supervisor created and managed the El Centro sector's Honorfit Health and Wellness program, which includes CrossFit, and taught CrossFit classes. According to the supervisor, all instructors earned AUO at the 15 percent rate, except for one person who earned 20 percent. Based on the written sworn statement, it appears that the supervisor believed that any Honorfit-related or administrative task that needed to be finished before leaving for the day qualified for AUO.

In the sworn statement, the supervisor wrote, "I was never informed by management that I nor my instructors were no longer entitled to AUO [for the Honorfit program]…My understanding of AUO is that it's uncontrollable. If you can leave the work for the next day or pass it off to another supervisor then you must go home…There were many days where I was overwhelmed and I requested a second supervisor to assist me. That was denied. It is common practice for supervisors throughout the sector to stay past their 8 hours to complete assignments that can't be passed off to another [supervisory Border Patrol agent] or wait until the next [day]…We run eight classes a day, every hour on the hour. At the end of the day we are tasked with cleaning the gym and sanitizing equipment. If administrative work needs to be done then I complete it. If it can wait for the next day I go home."

In the weeks prior to the interview, El Centro sector management asked the supervisor to adjust instructors' schedules so that they would no longer be teaching full-time. Instead, agents would either spend 4 hours

of an 8-hour shift teaching classes and be assigned to the El Centro Border Patrol Station for the remainder of shift, or teach one 8-hour day per week and work the remaining days in the field. In the sworn statement, the supervisor wrote, "Due to recent problems with AUO I was tasked by management to adjust mine and my agents' schedules to allow AUO to be worked in the field. As of December 31, [2013], our schedules have changed to reflect 4 hours instructing and after, report to the field for another 4 hours and if there is work to be done on AUO then it can be claimed. We can no longer claim AUO if 8 hours is being done instructing. If we do not want to claim AUO then we can choose to instruct for 8 hours." As of the date of the interview, the El Centro sector did not have a standard operating procedure for the Honorfit Health and Wellness program.

Actions Taken and Planned

Effective January 28, 2014, CBP suspended the use of AUO for employees engaged as full-time training instructors. At the time of our review, USBP was no longer using AUO to compensate employees for any work related to CrossFit.

Appendix A
Description of USBP's CrossFit Programs

Sector	CrossFit Program Description	No. of Instruc-tors	Typical Detail Duration	Received AUO for CrossFit Activities
El Centro	CrossFit is part of the Honorfit Health and Wellness Program, implemented in November 2012. Began as full-time instruction; converted to part-time in January 2014	10	2 years	Yes (before AUO suspension for full-time instructors)
El Paso	The Honor First CrossFit program began in September 2012. CrossFit classes are also open to other agencies. Began as full-time instruction; converted to part-time in January 2014	7	18-24 months	Yes (before AUO suspension for full-time instructors)
Del Rio	The Del Rio Fitness Program incorporated CrossFit into the program in October 2012. Began as full-time instruction; converted to part-time in January 2014	7	1 year	Yes (before AUO suspension for full-time instructors)
Laredo	A CrossFit program was initiated in November 2011. Began as full-time instruction; converted to part-time in January 2014	18	2 years	Yes (before AUO suspension for full-time instructors)
Rio	A CrossFit program was	3	2 years	Yes (before

Grande Valley	initiated in May 2012. Began as full-time instruction; converted to part-time in January 2014			AUO suspension for full-time instructors)
San Diego	CrossFit instruction began approximately in January 2013. The program also has volunteer instructors. Began as part-time instruction, later became full-time, converted back to part-time in January 2014	48	N/A – instructors are not detailed	Yes (before AUO suspension for full-time instructors)
Spokane	CrossFit is part of the Health Incentive Program and began in August 2012. CrossFit instruction has always been a collateral duty and is only provided when it does not interfere with the agents' other duties; AUO was not paid for CrossFit activities.	4	N/A – instructors are not detailed	No (AUO was never used for CrossFit-related activities)
Tucson	CrossFit is part of the Health Incentive Program and began in August 2012. CrossFit instruction has always been a collateral duty and is only provided when it does not interfere with the agents' other duties; AUO was not paid for CrossFit activities.	47	N/A – instructors are not detailed	No (AUO was never used for CrossFit-related activities)

Appendix B
CBP Form G-1012 Template

U.S. Department of Homeland Security
Customs And Border Protection

Record of AUO Hours Worked

NAME	SSN	PP#	FOR PERIOD FROM:	TO:

POSITION TITLE	% AUO 25	REGION	SECTOR/DISTRICT	STATION/DEPT/PROGRAM

Date	DAILY TOUR DUTY HRS	AUO HRS WORKED	EXCLUDABLE DAYS	REASON FOR AUO HRS WORKED OR ABSENCE
Sunday				
Monday				
1/1				
Tuesday				
1/2				
Wednesday				
1/3				
Thursday				
1/4				
Friday				
1/5				
Saturday				
1/6				
Sunday				
1/7				
Monday				
1/8				
Tuesday				
1/9				
Wednesday				
1/10				
Thursday				
1/11				
Friday				
1/12				
Saturday				
1/13				
TOTAL				

Certified True and Correct:	Examined and Approved:
Employee Signature	Supervisor Signature

Form G-1012 (2/9/99)

Appendix C
Conduct of the Review

Objective and Scope: The objective of this evaluation was to assess, to the extent possible given limited resources, the validity of the whistleblower's allegation that Border Patrol agents serving as CrossFit instructors fail to perform duties that qualify for AUO. Our objectives included determining instructors' justifications for receiving AUO pay, and whether the use of AUO for CrossFit activities was consistent with Federal regulations. The scope of this evaluation was 2013 and 2014. We did not include a determination of the cause or effect of improper use of AUO in the scope.

Regulations and Policies Governing AUO: We reviewed 5 CFR § 550.151 and 5 CFR § 550.153(c), as well as Section 1.3.103 of the Immigration and Naturalization Service Administrative Manual. We also reviewed Acting CBP Commissioner Thomas Winkowski's January 28, 2014, memorandum on "Administratively Uncontrollable Overtime," and other regulations and policies related to AUO.

Judgmental Sample of *Record of AUO Hours Worked* forms (G-1012 forms): CBP provided a list of 144 Border Patrol agents and supervisors who taught CrossFit classes and received AUO pay from January 1, 2013, through the first three pay periods of 2014. We selected a judgmental sample of 224 G-1012 forms from random pay periods in 2013 and the first three pay periods in 2014.

Review of G-1012 Forms: We reviewed the 224 G-1012 forms to determine the number of hours charged to AUO for CrossFit-related activities. Of the 224 forms, 154 were completed between January 13, 2013, and January 25, 2014, before AUO was suspended for full-time instructors. (CBP suspended AUO for full-time instructors effective January 28, 2014.) We reviewed 70 forms completed after AUO was suspended to verify that agents were no longer claiming AUO for CrossFit-related activities.

Employee Interviews: As shown in table 2, we selected 10 supervisory and 25 nonsupervisory agents from CBP's list of 144 Border Patrol agents and supervisors who taught CrossFit classes. (Not every sector had supervisors involved in teaching CrossFit classes.) We interviewed these employees between March 11 and June 12, 2014, to determine the tasks agents performed during AUO hours. We asked additional questions to determine the agents' understanding of AUO requirements.

Table 2: Employee Interviews

Sector	Supervisory Interviews	Nonsupervisory Interviews	Total Interviews
El Centro, California	0	8	8
El Paso, Texas	1	2	3
Del Rio, Texas	0	3	3
Laredo, Texas	2	2	4
Rio Grande Valley, Texas	1	1	2
San Diego, California	2	2	4
Spokane, Washington	0	3	3
Tucson, Arizona	4	4	8
Total	**10**	**25**	**35**

On January 2, 2014, we interviewed the El Centro supervisor specifically named by the whistleblower in OSC's December 9, 2013, referral letter to DHS Acting Secretary Rand Beers and obtained the supervisor's written sworn statement.

Evaluation Standards: We conducted this review under the authority of the *Inspector General Act of 1978,* and according to the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency, dated January 2012.

ADDITIONAL INFORMATION AND COPIES

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov. Follow us on Twitter at: @dhsoig.

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