



**U.S. Immigration
and Customs
Enforcement**

Ms. Carolyn N. Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, D.C. 20036

Re: OSC File No. DI-14-1637

Dear Ms. Lerner:

In accordance with Title 5, United States Code (U.S.C.), section 1213(c) and (d), the enclosed report is submitted in response to your referral of allegations that employees of the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Office of Enforcement and Removal Operations (ERO), Bakersfield, California, office engaged in conduct that may constitute violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; or an abuse of authority. Specifically, the Office of Special Counsel (OSC) received allegations from an individual who requested anonymity that employees claim Administratively Uncontrollable Overtime (AUO) on a daily basis but fail to perform duties that qualify for AUO, and that management knowingly approves of the improper AUO use. At the OSC's request, ICE's Office of Professional Responsibility (OPR) conducted an investigation into the allegations. I have been delegated the authority to review and sign this report.

ICE has enclosed two versions of its report along with a plan of action as a result of the investigatory findings. The first version of the report contains the names and positions of ICE law enforcement officers and is For Official Use Only (FOUO), as specified by 5 U.S.C. § 1213(e). Each page of the report has been marked accordingly. We understand that, as required by law, you will provide a copy of the unredacted version of the report to the President of the United States and the appropriate oversight committees in the Senate and House of Representatives for their review. In these legally required re-disclosures of the unredacted report, ICE respectfully requests that the OSC retain ICE's FOUO markings and convey the sensitivities of the identifiable information contained in the report.

The second version of the report has been redacted to eliminate references to privacy-protected information and is suitable for release in accordance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552. ICE has redacted the names and positions of law enforcement officers pursuant to FOIA exemptions (b)(6) and (b)(7)(C) because the release of this information would constitute a clearly unwarranted invasion of the law enforcement officers' personal privacy. Accordingly, these exemptions are specifically asserted to protect ICE's law enforcement officers from possible acts of threat, coercion, and bribery. ICE requests that only the redacted version of the report be made available on your website, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the unredacted report.

For Official Use Only (FOUO)

OSC File Nos. DI-14-1637

Please do not hesitate to contact my office at (202) 732-3000 should you require any further information regarding these matters.

Sincerely,



Daniel H. Ragsdale
Deputy Director

Enclosure

Cc: Chief Human Capital Officer
Principal Deputy General Counsel

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I. Summary of Information with Respect to Which the OPR Investigation was Initiated

On an unknown date, an individual who requested anonymity made the following allegations to the Office of Special Counsel (OSC) regarding employees in the U.S. Immigration and Customs Enforcement (ICE), Office of Enforcement and Removal Operations (ERO) sub-office in Bakersfield, California:¹

Allegation 1: ERO employees claim Administratively Uncontrollable Overtime (AUO) on a daily basis but fail to perform duties that qualify for AUO.

Allegation 2: ERO management knowingly approves improper AUO use.

On March 21, 2014, the OSC provided a letter to Jeh Johnson, the Secretary of the Department of Homeland Security (DHS), referring the allegations to ICE for an investigation and requesting a report of findings within 60 days.

According to the information referred by the OSC, the whistleblower alleged that all employees, including supervisors, have claimed and continue to regularly claim one to four hours of AUO daily. The whistleblower claimed that because of the low number of detainee cases received and arrests made, the work being used to justify AUO is not sufficiently compelling that a failure to carry it out would constitute negligence. The whistleblower also alleged that employees are claiming AUO while performing pre-planned or administratively-controllable work that does not justify the receipt of AUO. Such work allegedly includes processing paperwork, attending pre-planned removal proceedings, and completing other administrative duties. The whistleblower also alleged that management has advised employees to vary the amount of daily AUO on their timesheets in order to avoid suspicions of illegitimate use for potential audits.

On April 22, 2014, the matter was assigned to the ICE Office of Professional Responsibility (OPR) for investigation. The Agency received extensions through October 3, 2014, to provide the report to the OSC.

II. Description of Conduct of OPR's Investigation

OPR reviewed the information sent to the OSC and conducted interviews of a Deputy Field Office Director (DFOD), Assistant Field Office Director (AFOD), Supervisory Detention and Deportation Officers (SDDOs), Deportation Officers (DOs), Immigration Enforcement Agents (IEAs), Enforcement Removal Assistant (ERAs), and other administrative support personnel. The interviews focused on the employees' understanding of AUO, the training they received on AUO, and, if in a position authorized for AUO, the specific mission-related duties they accomplish while claiming AUO.

¹ The individual will be referred to in this document as the "whistleblower." Because the whistleblower requested anonymity, OPR was unable to interview the whistleblower to obtain additional information regarding the specific allegations.

The following employees were interviewed during the OPR investigation:

- DFOD [REDACTED]
- AFOD [REDACTED]
- SDDO [REDACTED]
- SDDO [REDACTED]
- SDDO [REDACTED]
- SDDO [REDACTED]
- DO [REDACTED]
- IEA [REDACTED]
- ERA [REDACTED]
- ERA [REDACTED]
- Mission Support Specialist (MSS) [REDACTED]
- MSS [REDACTED]
- MSS [REDACTED]

In addition to the interviews, OPR reviewed certified Time and Attendance (referred to as “WebTA”) records and the associated AUO worksheets referred to as “AUO form”) for all 37 qualified employees assigned to the ERO Bakersfield office. The review period covered a six-month period from October 19, 2013, through May 3, 2014 (a total of 14 pay periods). While employees validate their hours worked in WebTA, including AUO hours, justifications for AUO hours can only be documented on the AUO form. WebTA does not allow employees to electronically document their justifications for AUO. In addition, OPR compared AUO hours approved on the AUO forms with the hours claimed in WebTA to verify consistency in the AUO hours claimed by the subjects and reviewed all justifications on the AUO forms to determine if those justifications were sufficient to support AUO.

OPR reviewed employee justifications on the AUO forms to determine if they were “compelling and inherently related” to the continuance of their duties such that a failure to carry on would

“constitute negligence” as mandated in 5 C.F.R. § 550.153(c).² Justifications were also reviewed to determine if the claims constituted a situation that could not be controlled administratively, particularly by the use of such administrative instruments 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, as outlined in 5 C.F.R. § 550.153(a).

Justifications that clearly met the criteria were considered “sufficient” by OPR. Justifications that included duties considered administrative or regular, or which lacked adequate detail, were considered “insufficient” by OPR. If there were multiple justifications, so long as one justification was considered “sufficient,” OPR deemed the entire justification to be “sufficient.”

III. Summary of Evidence Obtained from the OPR Investigation

A. Background Regarding ICE ERO and the Bakersfield Sub-office

The ERO Bakersfield office is a sub-office of ERO San Francisco, which is managed by a Field Office Director, who oversees ERO Bakersfield. ERO Bakersfield is directly managed by a DFOD, an AFOD, and five SDDOs. The office has 13 DOs, 17 IEAs, three ERAs, and three administrative support personnel. Thirty-seven of the 43 positions qualify for AUO.³

The area of responsibility (AOR) for ERO Bakersfield consists of 4 counties, 24 cities, and has a population of over 1.5 million people. The office also responds to calls from 20 correctional facilities, which include Federal, State, County, and Juvenile facilities. The physical AOR for the ERO Bakersfield office covers over 26,000 square miles of central and southern California and is the second largest geographic area of any ERO office in the state of California.

The ERO Bakersfield office is responsible for the daily operations of the following:

- CAP – The Criminal Alien Program (CAP) provides ICE-wide direction and support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens who have circumvented identification. The identification and processing of incarcerated criminal aliens, before release from jails and prisons, decreases or eliminates the time spent in ICE custody and reduces the overall cost to the federal government.
- ICE Air – The primary goal of ICE Air Operations is to provide aviation support, both domestically and internationally, to the 24 ERO Field Offices that are strategically located throughout the United States. ICE Air Operations’ goal is to transport aliens ordered removed from the United States to staging sites in order to complete flights to

² A justification on an AUO form is not sufficient evidence to prove if the hours were actually worked or if the duties reported were actually performed. The determinations of “sufficient” versus “insufficient” were made by OPR to identify which justifications should be followed up on during the subject or employee and supervisor interviews.

³ These 37 employees are referred to in this document as the “subjects” of the OPR investigation. The three ERAs and the three administrative support personnel are not in positions that qualify for AUO.

aliens' countries of origin. Southern cities, such as San Diego, California, and Brownsville, Texas, are used for Mexican removal operations. ICE Air Operations is divided into two sections, Commercial and Charter. ICE terminated its relationship with the U.S. Marshals Service for the Justice Prisoner Alien Transportation System (JPATS) effective October 1, 2010.

- OREC – Order of Recognizance (OREC) is a type of release under prescribed reporting conditions while the alien is in removal proceedings and prior to the alien becoming subject to a final order of removal.
- OSUP – Order of Supervision (OSUP) is a type of release under prescribed reporting conditions after the alien has become subject to a final order of removal.
- Meet and Greet - A Meet and Greet is a process utilized to assist with the removal/movement of ICE detainees. One ERO Field Office may coordinate with another ERO Field Office to receive a detainee whose scheduled travel requires transiting through their respective AOR. The sending ERO Field Office will coordinate with the receiving ERO Field Office to determine availability to assist on a requested date and time. The receiving office will confirm availability and meet the flight and proceed with the next leg of travel.
- Fugitive Operations – The primary mission of the National Fugitive Operations Program (NFOP) is to reduce the fugitive alien population within the United States. The NFOP identifies, locates, and arrests fugitive aliens; aliens that have been previously removed from the United States; removable aliens who have been convicted of crimes; as well as aliens who enter the United States illegally or otherwise defy the integrity of our immigration laws and border control efforts.
- VCAS – The Violent Criminal Alien Section (VCAS) screens recidivist criminal aliens encountered through ERO's enforcement efforts and local law enforcement to seek criminal prosecution to mitigate the risk of future recidivism and enhance the integrity of the U.S. immigration system. Integral to success in this effort is the collaboration with the Offices of the United States Attorneys to prosecute the charged criminal offenders.
- Secure Communities – When state and local law enforcement arrest or book someone into custody for a violation of a criminal offense, they generally fingerprint the person. After fingerprints are taken at the jail, the state and local authorities electronically submit the fingerprints to the Federal Bureau of Investigation (FBI). This data is then stored in the FBI's criminal databases. After running the fingerprints against those databases, the FBI sends the state and local authorities a record of the person's criminal history. With Secure Communities, once the FBI checks the fingerprints, the FBI automatically sends them to DHS, so that ICE can determine if that person is also subject to removal (deportation).

B. Relevant Regulations

The federal regulations most pertinent to the OPR investigation are as follows:

5 C.F.R. § 550.151 authorizes agencies to pay AUO annually “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(c) provides, “The words in § 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 the 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. § 550.163(b) provides that an “employee receiving premium pay on an annual basis under § 550.151 may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work, and work at night, on Sundays, and on holidays.”

C. Relevant Policies and Guidance

As with some other DHS components, ICE continues to reference guidance and policies from prior agencies who administered AUO (i.e., the Immigration and Naturalization Service (INS) and/or the U.S. Customs Service (USCS)).

The INS Administrative Manual (AM), Section 1.3.103 contains the following information regarding AUO:

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.

The INS AM also provides examples of incorrect applications of AUO. Examples of potential misuses include:

- (1) Payment of AUO 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;

The ICE Office of Human Capital has posted criteria for the applicability of AUO on the ICE employee website, which in part states:

The requirement that an employee must be required to perform “substantial amounts of irregular or occasional overtime work” involves the following elements:

- A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work;
- The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week; and
- 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 requirements of this Section.

The requirement that an employee is generally “responsible for recognizing, without supervision, circumstances which require him or her to remain on duty” means that:

- The responsibility for an employee to remain on duty when required by circumstances must be a definite, official, and special requirement of his or her position;
- The employee must remain on duty not merely because it is desirable but because of compelling reasons inherently related to continuance of his or her duties, and of such a nature that failure to carry on would constitute negligence; and
- 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.

The words “require the employee to remain on duty” mean that:

- The employee is required to continue on duty in continuation of a full daily tour of duty or, that after the end of the regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event (performance of only callback overtime work does not meet this requirement); and
- The employee has no choice as to when or where he or she may perform the work when he or she 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 or her regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in working hours, as when in a travel status, that he or she may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.)

In June 2007, the ICE ERO Assistant Director for Management sent a memorandum to all Field Office Directors requesting review of the general statutory and regulatory requirements pertaining to AUO to ensure its proper administration via supervisors.

Additionally, the Office of Personnel Management (OPM) has issued guidance regarding AUO.⁴ The OPM Fact Sheet entitled “Guidance on Applying FLSA Overtime Provisions to Law Enforcement Employees Receiving Administratively Uncontrollable Overtime Pay,” found at <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/guidance-on-applying-flsa-overtime-provisions-to-law-enforcement-employees-receiving-administratively-uncontrollable-overtime-pay/> (last visited Dec. 20, 2013), provides,

While an employee must have a substantial amount of irregular overtime with certain characteristics to qualify for AUO pay, once AUO pay becomes applicable it becomes the sole compensation under title 5 for ALL irregular overtime or occasional hours. (See 5 CFR 550.163(b). Note also that all irregular or occasional overtime hours are used in determining the AUO percentage under 5 CFR 550.154(a).) The type of hours needed to qualify for AUO pay (i.e., qualifying conditions in 5 CFR 550.153) are narrower than the type of hours compensated by AUO pay.

Additionally, the OPM Compensation Policy Memorandum 97-5A states, “[W]hile the conditions for AUO pay... ‘generally’ require that an employee’s hours of duty may not be subject to administrative control, that does not mean that overtime work must be compensated on an hourly basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time.” OPM Compensation Policy Memorandum 97-5A, *Guidance on Administratively Uncontrollable Overtime (AUO) Pay* § III (June 13, 1997).

Finally, in February 2014, in response to allegations made to the OSC regarding the possible misuse of AUO, ERO senior management sent an email to its employees indicating that DHS

⁴ The OPM guidance was not specifically referenced during OPR’s underlying investigation. However, ICE is including it within this report given its relevance to the subject matter.

and ICE would be reviewing its policies and practices on the use of AUO. That email also described the immediate actions being taken by DHS (e.g., immediate suspension of AUO for certain positions) and the criteria necessary for a position to be approved for AUO pay.

D. Analysis of AUO Documentation for ERO Bakersfield Employees

OPR reviewed WebTA certified records and the corresponding AUO form, covering 14 pay periods for the 37 subjects. A total of 7,784.75 AUO hours was cumulatively claimed by the 37 subjects. The analysis revealed the following:

- OPR found that during the 6 month review period, 87 percent of the AUO justifications reviewed were deemed insufficient and 13 percent were deemed sufficient.
- Sufficient descriptions include: “CHP callout A#, A# running checks for DO ██████████ 4bee347 surveillance,” “1326 prep for FUGOPS A#1326 afterhours discussion from AUSA on declination,” “SNJ court arrest A#,” “Conducting surveillance and arresting A#,” “After hours call out KC Sheriff’s dept.”
- Insufficient descriptions include: “TECS cases,” “Jury duty Fresno US District Court (drove home after court),” “IEA duties,” “process paperwork,” “continuous work,” “return from LA after getting PIV card” “CPR training,” “Serve files,” “CAP,” “JPATS,” “SDDO duties,” “Fug Ops,” “transportation,” and “Virtual University.”
- As previously mentioned, justifications that clearly met the criteria were considered “sufficient” by OPR. Justifications that included duties considered administrative, regular, or lacked adequate detail were considered “insufficient” by OPR. If there were multiple justifications, so long as one justification was considered “sufficient,” OPR deemed the entire justification to be “sufficient.” As a result, OPR found that a majority of the AUO justifications reviewed were insufficient. A number of justifications referencing operational activities such as criminal alien program, ICE Air, JPATS, etc., were determined to be insufficient by OPR because the justifications were vague and lacked adequate detail. These duties could possibly qualify for AUO; however, more information was needed to be certain. Therefore, the descriptions were included in the insufficient category.
- OPR also found AUO justifications were repetitive in nature; 31 of the 37 subjects reviewed used a repetitive justification 30 or more times. For example, five employees used the phrase “IEA duties” which together combined 266 times out of a 538 total instances (49 percent) of AUO claimed by these employees. One employee used “transportation” as a sole justification 56 times out of 58 instances of total AUO claims. A third employee used the phrase “processed detainee paperwork” as a sole justification 53 times out of 104 instances (51 percent) of total AUO claims.
- The average AUO hours worked for each of the ERO Bakersfield employees was over 210 hours for the 6 months examined (over 7,784 hours total among the 37 subjects

whose records were reviewed). The least amount of AUO worked by any individual subject during this period was 69 hours, while the greatest was 281 hours.

- OPR found 32 of the 37 subjects (86 percent) were at the maximum 25 percent AUO certification allowance throughout the entire review period.
- In three instances, AUO hours claimed in WebTA exceeded the number of hours claimed on the employee's AUO form. One employee claimed a total of five more AUO hours in WebTA than what was claimed on the AUO form. A second employee claimed a total of one and a half more AUO hours in WebTA than what was claimed on the AUO form. A third employee claimed a total of 15 more minutes in WebTA than what was claimed on the AUO form.

E. Information Obtained from Employee Interviews

OPR conducted interviews of 19 employees who receive AUO and 5 employees who are not eligible for AUO in the ERO Bakersfield office. As background, pursuant to 8 C.F.R. § 287.7(d), an immigration detainer is a request that ICE sends to local law enforcement agencies requesting that they continue holding an individual for up to 48 hours after he or she would otherwise be released, so that ICE can assume custody. In the state of California, however, ICE detainers are rarely honored by state and local law enforcement agencies and individuals may only be taken into custody by ICE at the time they are released, which may occur at any time throughout the day or night. Thus, there is a very limited time frame for ERO to assume custody of an individual before they are released by a state or local law enforcement agency.

Interviews of employees disclosed a common and consistent pattern in the documentation and justifications used to articulate AUO. AUO certified employees stated they worked AUO on a regular basis to accomplish tasks which could not be completed during the course of the normal workday. Some of the examples of administratively uncontrollable duties that were common in the ERO Bakersfield office were: inmate releases from local institutions or bond postings; interviewing detainees within tight deadlines to take biometrics and determine their immigration status; X-rays for tuberculosis determinations; ICE air transport arriving/departing late or not at all; transport to emergency room for treatment; and unscheduled pickups of detainees from local institutions.

OPR asked ERO employees about common AUO justifications noted on AUO worksheets. During the interviews, five ERO employees stated they claimed AUO for "Processing and Preparation of Local CAP Cases" which included identifying criminal aliens, obtaining information on that specific alien, and conducting interviews related to the specific CAP cases. The employees stated this was a common form of AUO that was not administratively controllable as once they are notified about a suspected alien, ERO employees need to travel to the facilities within the Bakersfield AOR, interview the individual, take biometrics, travel back to the office, conduct checks on the individual and, if determined to be illegally present in the United States, prepare the proper paperwork, have the paperwork approved immediately by the supervisor, and travel back to the facility the individual was located and serve them with the paperwork. During the interviews, IEA [REDACTED] who is assigned exclusively to the transportation

unit, stated he provided the AUO justification “transportation” on the AUO form and was used when AUO was worked due to unforeseen circumstances involving the transportation of detainees. Examples of the circumstances provided by IEA ██████ were late pickups from jails, releases from institutions or bond postings, ICE air transport arriving/departing late or not at all, aircraft grounding for maintenance issues in Bakersfield, vehicle breakdown and traffic. During the interviews, IEA ██████ stated that he repeatedly provided the AUO justification “processed detainee paperwork” on the submitted AUO form to refer to the paperwork required to process a detained individual. Examples of the “processed detainee paperwork” description given by the employee were: NTA – Notice To Appear, R – Warrant of Removal, NCIC – Criminal History Checks, I-213 – Record of Deportable Alien, I-247 – Detainer, I220A – Own recognizance (OR). Employees stated during the interviews that processing requisite paperwork could frequently become AUO depending upon when the call was received to process an individual that would require continued action outside of their regularly assigned shift.

During the interviews, all of the ERO Bakersfield employees, stated they had never received formal training on AUO, had no refresher training on AUO, had never received guidance on what specific duties were allowed or what duties were not permissible when claiming AUO, and received no guidance or instructions on the completion of the AUO form and relied on prior precedent established during the course of their tenure with ERO.

Interviews of ERO Bakersfield managers disclosed that none of the managers received specific training regarding the use or approval of AUO while attending ICE manager training and each manager stated that they approved AUO justifications for what they believed to be mission critical tasks that were consistent with past practices of how the ERO mission is accomplished. Information obtained in the interviews additionally revealed:

- Managers approved AUO for what they believed to be mission critical tasks consistent with past practices of how the ERO mission is accomplished.
- Prior to the ICE guidance on AUO, issued in February 2014, there was minimal updated guidance from ERO Headquarters related to the use, approval and documentation of valid justifications for AUO qualified work.
- Managers acknowledged that prior to February 2014, submissions of AUO forms did not provide sufficient details to justify the duties that qualified for AUO.

The whistleblower alleged that all employees, including supervisors, have claimed and continue to regularly claim one to four hours of AUO daily despite the low number of detainee cases received and arrests made that would necessitate AUO. Interviews conducted by OPR did not substantiate this allegation as all of the employees asserted that they had claimed AUO for the actual hours that they worked and the large volume of arrests necessitated the need for AUO. In Fiscal Year (FY) 2013, the ERO Bakersfield office had a total of 398 fugitive arrests, of which 325 were criminals and 73 non-criminals. In FY13, there were 6,441 Criminal Alien Program (CAP) encounters, 4,619 CAP detainees issued, 4,056 CAP arrests and 3,460 CAP removals.

The whistleblower also alleged that employees are claiming AUO while performing pre-planned and/or administratively controllable work and thus, their work does not justify the receipt of AUO. These duties include processing paperwork, attending pre-planned removal proceedings, and other administrative duties. Interviews conducted by OPR substantiated this allegation. During the interviews, employees stated that due to the limited time frame allowed to process suspected aliens, AUO was claimed on a regular basis for administratively controllable tasks (e.g., Virtual University and CPR training) with impending deadlines and for which there was insufficient time to complete them during the course of their regularly scheduled duty hours.

The whistleblower further alleged that that employees stay past their eight-hour shifts and claim AUO even when there is no work to be completed and employees claim AUO while sitting at their desks, and engaging in fitness activities. Interviews conducted by OPR failed to develop evidence to substantiate this allegation as no employee interviewed stated that they stayed in the office after their shifts, sat at their desks or performed fitness exercises while claiming AUO. Additionally the OPR analysis could not find any instances where an employee claimed “fitness activities” as an AUO justification. Furthermore, since the whistleblower requested anonymity, OPR was unable to interview the whistleblower to obtain additional information regarding this specific allegation.

The whistleblower alleged that management has advised employees to vary the amount of daily AUO on their timesheets in order to avoid suspicions of illegitimate use for potential audits. Interviews conducted by OPR did not substantiate this allegation, as no employee reported being instructed to stagger AUO hours to avoid suspicion during future audits, nor did any manager advise that they asked employees to stagger AUO hours. Additionally, since the whistleblower requested anonymity, OPR was unable to interview the whistleblower to obtain additional information regarding this specific allegation.

IV. Listing of any Violation or Apparent Violation of Law, Rule, or Regulation

The OPR investigation substantiated the following allegation made by the whistleblower:

- ERO employees claim Administratively Uncontrollable Overtime (AUO) on a daily basis but fail to perform duties that qualify for AUO.

The OPR investigation revealed that ERO Bakersfield employees, in most circumstances, provided justifications for AUO hours that were either vague in nature or may not have qualified for AUO premium pay. Although some of the duties listed on the AUO forms may have been administratively uncontrollable given the situation, due to the lack of detail, OPR was not able to make a determination based solely on the justifications provided. During the interviews, employees stated that due to the limited time frame allowed to process suspected aliens, AUO was claimed on a regular basis for administratively controllable tasks with impending deadlines and for which there was insufficient time to complete them during the course of their regularly scheduled duty hours. The employees claim that they submitted AUO justifications only for hours that they had worked and their submissions were based on their own interpretation of existing statutes and agency policy and the accepted precedent established during the course of their tenure with ERO.

The OPR investigation failed to substantiate the following allegation made by the whistleblower:

- ERO management knowingly approves improper AUO use.

The OPR investigation revealed that this lack of management scrutiny, in combination with minimal updated agency guidance and lack of training regarding the use of AUO, may have contributed to ERO Bakersfield managers approving AUO justifications that, in most circumstances, were either vague in nature or that did not qualify for AUO premium pay. Nevertheless, the OPR investigation failed to substantiate this allegation of knowingly approving improper AUO use based on its finding that the ERO Bakersfield management approved AUO for what they believed to be mission-critical tasks consistent with past practices of how the ERO mission is accomplished. Retrospectively, the managers acknowledged that prior to the ERO email that was sent to its employees in February 2014, the AUO forms lacked sufficient details to justify the duties that qualified for AUO.

V. Description of Action Taken or Planned as a Result of Investigation

ICE is committed to administering overtime pay in a manner that is consistent with law, regulation, and policy. As initially provided for in its January 27, 2014, report to the OSC, ICE has initiated a variety of measures to ensure that AUO is properly administered across the agency. Specifically, ICE has issued guidance and training that explain proper AUO practices, is finalizing an updated form for recording AUO hours, and has conducted and is finalizing a thorough review of all positions currently authorized for AUO to confirm that they meet the regulatory criteria. Additionally, the agency will continue to promptly investigate all claims of AUO abuse and will take appropriate remedial action.

A. Guidance Memoranda on Proper AUO Administration

On July 21 and 22, 2014, ICE issued two guidance memoranda—one for all ICE supervisors and one for all ICE employees receiving AUO. The July 21, 2014, guidance memorandum for supervisors explains the supervisor's role and responsibilities with respect to proper AUO administration, and reminds them that they must comply with and understand the laws governing AUO. The memorandum instructs supervisors to determine whether their subordinate employees' AUO justifications are consistent with AUO law and policy, and to work with the Office of Human Capital to decertify those individuals whose duties are not consistent with the regulatory criteria for AUO. The guidance memorandum for supervisors also includes an Acknowledgment of Receipt, which supervisors were required to sign and return to the Office of Human Capital.

The July 22, 2014, guidance memorandum for all employees receiving AUO reminded employees of their obligation to submit accurate time and attendance records, and to be especially attentive when claiming AUO. It includes a description of the types of "administratively uncontrollable" duties that generally warrant irregular and occasional overtime justifying AUO. The guidance also differentiated those duties that can be controlled administratively. Specifically, the guidance explains that where a duty can be readily scheduled

in advance of the administrative workweek or performed during an employee's next tour of duty, it does not warrant AUO.

B. Premium Pay Guide

On July 22, 2014, the ICE Office of Human Capital issued a detailed premium pay guide explaining the statutory and regulatory requirements governing the different forms of premium pay, as well as examples and scenarios to provide context. The guide contains a detailed section on AUO that explains the criteria for certifying an employee for AUO, the computation of AUO, and the criteria for discontinuing AUO. The guide also includes an explanation of the various other forms of premium pay that may be available to ICE employees when relevant criteria are met, to include the Fair Labor Standards Act, Federal Employees Pay Act, and Law Enforcement Availability Pay. Additionally, the premium pay guide includes appendices setting forth the responsibilities of management and employees for requesting and/or approving premium pay, including specific guidance regarding the proper use and documentation of AUO.

C. Premium Pay Training

ICE's Office of Human Capital has developed premium pay training for supervisors and employees, based on the premium pay guide. The training provides detailed guidance on the different forms of premium pay, to include AUO. The first round of training was given to senior headquarters and field office management on July 15, 2014, both in person and through Sonexis. Additionally, on March 27, 2014, AUO training slides for managers were made available on Virtual University, ICE's electronic database for training opportunities. This online training course is now an annual requirement for managers of employees certified for AUO. Furthermore, the Office of Human Capital is in the process of contracting the service of a federal pay subject matter expert to travel to field offices across the country to provide guidance to employees on premium pay, to include AUO. This training is expected to take place in fiscal year 2015. The slides from this training will be made available to all employees on Virtual University and will be supplemented by additional web-based training, which will cover portions of the premium pay guide that were not addressed in the in-person training program.

The Office of Human Capital has solicited questions and will be issuing a set of answers to Frequently Asked Questions regarding premium pay, to include AUO. The set of answers will be disseminated and posted for employees, as well as supplemented by teleconferences with managers to resolve any additional concerns.

D. New AUO Form with Duty Codes and Justifications

To ensure the proper administration of AUO, the agency has developed and is finalizing an updated form for recording AUO that includes a list of duty codes from which to select when recording AUO hours. The duty codes correspond to a detailed justification document, which explains those duties that generally warrant AUO and provides employees with detailed instructions for properly justifying AUO on their timesheets. The new form also requires employees to explain the situation justifying the irregular and occasional overtime, such as

unforeseen delays, emergency circumstances, or supervisory orders. Once issued, the agency plans to conduct training on proper use of the form.

E. Position-by-Position Review

ICE's Office of Human Capital is finalizing a position-by-position review of each position that is currently authorized for AUO and plans to implement its findings early in fiscal year 2015. The position review encompasses approximately 6000 employees in 64 positions ICE-wide. The review was designed to ensure compliance with the statutory, regulatory, and policy requirements for AUO. This review is not intended to serve as a definitive decision point on whether any individual employee(s) should be certified for AUO premium pay, but rather will address whether specific positions should be authorized for AUO coverage.

F. Third Party Audits

In an effort to monitor ICE's ongoing efforts to promote and maintain a culture of compliance with regard to the use of AUO, ICE intends to expand its existing review of AUO practices in its OMB Circular A-123 audit. In order for the audit to appropriately evaluate the success of the other corrective actions put in place, this expanded audit will likely begin in fiscal year 2016.