



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

March 11, 2015

The President
The White House
Washington, D.C. 20500

Re: DHS Whistleblower Disclosures on Misuse of Overtime Pay Generate \$100 Million in Annual Cost Savings

Dear Mr. President:

Over the last two years, the Office of Special Counsel (OSC) received over a dozen whistleblower disclosures from employees at the Department of Homeland Security (DHS). Each of these employees sounded the alarm about widespread abuse of a pay authority called Administratively Uncontrollable Overtime (AUO). AUO is only for employees whose hours cannot be controlled and are often unpredictable, such as border patrol agents who must respond to criminal activity along the border, even if that means staying on duty beyond normal hours. According to federal regulation, AUO is limited to “irregular” or “occasional” circumstances, such that failure to stay on duty “would constitute negligence.”

In a prior communication to you on this issue, in October 2013, I raised serious concerns about DHS’s longstanding failure to manage hundreds of millions of dollars in annual AUO payments. The lack of adequate safeguards resulted in a significant waste of taxpayer dollars over many years. Repeated investigations in response to OSC referrals of whistleblower information confirmed that AUO payments were mismanaged, improperly documented, and routinely provided to individuals for performing duties that do not qualify for this type of pay.

I am pleased to report that over the last 14 months much has changed. After years of inaction, the entrenched problem of AUO abuse is on a path toward resolution. As detailed below, reforms initiated by DHS will result in greater accountability in AUO payments. In addition, Congress adopted a new pay system for Border Patrol agents that overhauls the outdated AUO system while generating cost savings of \$100 million annually. Collectively, these reforms protect the U.S. taxpayers from ongoing abuse of AUO. They also demonstrate the importance of whistleblowers in curbing waste, as these important changes would not have occurred if whistleblowers had not stepped forward.

The corrective actions are detailed in the reports, supplemental information, and whistleblower comments I submit today for the eleven cases being closed. The DHS

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reports and corrective action plans were generated in response to whistleblower disclosures from employees at DHS offices in Laredo, Texas; Houston, Texas; San Ysidro, California; Glynco, Georgia; El Centro, California; Herndon and Reston, Virginia; El Paso, Texas; Washington, D.C.; Chattanooga, Tennessee; and Bakersfield, California.¹ The reports confirm that employees in these offices misused AUO by claiming it for work that was not properly compensable as AUO and by failing to adequately document the work performed to justify the receipt of AUO. Based on my review, I have determined that the reports meet all statutory requirements and that the findings appear to be reasonable.²

In response to these findings, DHS initiated a series of reforms to combat AUO misuse. Importantly, DHS is in the process of finalizing a department-wide AUO directive to ensure lawful and consistent overtime pay administration by each of the DHS components.³ In addition, DHS required each of the agency components to conduct a review of individual positions and decertify jobs that do not meet all legal requirements for claiming AUO. Customs and Border Protection (CBP), where concerns about AUO abuse were most widespread, recently completed its review and determined that 139 of 187 positions within CBP do not meet AUO eligibility requirements. Those positions have been decertified. Immigrations and Customs Enforcement (ICE), which is the second-largest user of AUO in terms of dollars spent, is in the process of finalizing its position-by-position review.

According to DHS, as a result of these eligibility assessments, DHS components de-authorized over 2,300 employees for AUO pay between January 2014 and November 2014. Over 2,000 of the employees de-authorized to date were at CBP. During 2014, CBP reduced its biweekly AUO payment by \$3.2 million—an annualized savings of \$83.7 million. Many of the de-authorized positions were at training facilities and headquarters, the focus of whistleblower concerns and OSC-initiated investigations. The National Protection and Programs Directorate, Secret Service, and ICE also significantly reduced AUO payments in 2014, while working to adopt component-specific AUO guidance that will supplement the department-wide directive and ensure lawful

¹ The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). If the Special Counsel determines that there is a substantial likelihood that the disclosures are accurate, she is required to advise the appropriate agency head and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel solicits comments from the whistleblower and reviews the agency's report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2).

² The cases closed today are OSC File Nos. DI-12-1105; DI-13-1556; DI-13-2853; DI-13-3516; DI-13-4124; DI-14-0539; DI-14-0581; DI-14-0631; DI-14-1093; DI-14-1100; and DI-14-1637.

³ DHS first committed to developing a department-wide AUO directive in 2008, in response to whistleblower disclosures about AUO abuse from employees in Lynden, Washington.

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administration of AUO payments.⁴ In addition, DHS entirely suspended AUO payments for employees at DHS headquarters and U.S. Citizenship and Immigration Services.

Congress also responded to the concerns raised by whistleblowers. After receiving OSC's October 2013 report, Congress held three hearings on AUO, required an audit of AUO by the Government Accountability Office (GAO), and enacted a pay reform law for CBP's Border Patrol agents. The Border Patrol Pay Reform Act of 2014 eliminates AUO and other overtime payments for Border Patrol agents and establishes a new pay system for these employees. The new pay system will result in approximately \$100 million in annual savings to the taxpayers, according to a Congressional Budget Office estimate.

Under the new law, most Border Patrol agents assigned to border areas and field offices will continue to work extended hours—a policy determination supported by DHS, the Office of Border Patrol, representatives for the Border Patrol agents, and Congress. However, the new law does not provide for longer shifts for agents assigned to headquarters or training positions, duties that were routinely cited in investigative findings for improperly claiming AUO. The law also requires CBP to conduct a staffing assessment, which will be audited by GAO. The assessment will determine if the pay system and the number of hours worked by agents are sufficient to meet operational requirements. As CBP conducts this staffing assessment, I encourage the agency and GAO to assess whether extended shifts for the majority of Border Patrol agents are the best and most cost-effective means of securing the border.

I applaud the government's collective response to the long-standing problem of AUO abuse. Nevertheless, it is important to acknowledge the whistleblowers' continued concerns about the lack of disciplinary action taken as a result of the findings in the agency reports. Each whistleblower alleged specific instances of intentional AUO abuse. However, the response from DHS has focused primarily on the systematic breakdown and lack of consistent guidance surrounding the AUO regulatory scheme. Moving forward, employees should be held accountable for any deliberate violations of overtime policies. Accountability is the most effective means of deterring future wrongdoing. This is especially true now that DHS has established clear guidelines for AUO and other overtime pay.

OSC is awaiting the results of seven additional AUO matters. I look forward to continuing to work closely with DHS leadership and Congress to ensure future compliance with the DHS directives and the Border Patrol pay reform law. Finally, I thank the whistleblowers for their courage in coming forward. Their disclosures demonstrate their strong commitment to the country's economic well-being.

⁴ ICE's quarterly AUO expenditures decreased by \$4.2 million between fiscal year 2013, quarter 3, and fiscal year 2014, quarter 2, before seeing an uptick of \$2.8 million in the third quarter of fiscal year 2014. The administration and Congress may want to determine the cause of the AUO increase during the period.

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As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency reports and whistleblower comments to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs and the Chairman and Ranking Member of the House Committee on Homeland Security. I have also filed a copy of these reports and comments in our public file, which is available online at www.osc.gov, and closed these matters.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn Lerner", enclosed in a thin black rectangular border.

Carolyn N. Lerner

Enclosure