



U.S. OFFICE OF SPECIAL COUNSEL
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Washington, D.C. 20036-4505

The Special Counsel

March 24, 2016

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

Re: OSC File Nos. DI-13-3418 and DI-14-0666

Dear Mr. President:

Pursuant to my duties as Special Counsel, I am forwarding to you two reports provided to me in response to disclosures received from employees at the Department of Homeland Security (DHS) regarding the misuse of administratively uncontrollable overtime (AUO). As in previous reports received from DHS on this subject, the investigations confirmed that AUO payments were mismanaged, improperly documented, and routinely provided to individuals for performing duties that do not appear to qualify for this type of pay.¹ I have reviewed these reports and, in accordance with 5 U.S.C. § 1213(e), provide the following summary of the agency investigations and whistleblower comments, as well as my findings.² In brief, I conclude that the agency's report appears reasonable.

The whistleblower in the first matter, Nikki Hentemann, who consented to the release of her name, is currently a management program analyst in U.S. Citizenship and Immigration Service's (USCIS) Management Directorate, Investment Management Division. At the time relevant to the disclosure, Ms. Hentemann was an investigative specialist/ analyst in USCIS's Office of Security and Integrity (OSI). She alleged that OSI employees routinely misused AUO. The whistleblower in the second matter, who requested confidentiality, was employed by the Customs and Border Protection (CBP), Office of Internal Affairs (OIA), Washington, D.C. This whistleblower alleged that CBP OIA employees also routinely misused AUO.

¹ The previously closed cases were OSC File Nos. DI-12-1105; DI-13-1556; DI-13-2853; DI-13-3516; DI-13-4124; DI-14-0581; DI-14-0631; DI-14-1093; DI-14-1100; and DI-14-1637.

² 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). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, I review the agency 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). I will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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OSC referred these allegations separately to then-Acting DHS Secretary Rand Beers for investigation and a report under 5 U.S.C. § 1213(c) and (d). Acting Secretary Beers delegated responsibility for investigating the allegations to the DHS Office of Inspector General (OIG). The results of the investigations were forwarded to the respective agencies for appropriate action. USCIS Director Leon Rodriguez provided the results of the OIG investigation of Ms. Hentemann's allegations to OSC, while CBP Commissioner R. Gil Kerlikowske provided the results in the second disclosure matter. Ms. Hentemann commented on the agency report pursuant to 5 U.S.C. § 1213(e)(1). The whistleblower in the second matter declined to comment.

In her comments, Ms. Hentemann expressed concern that the DHS OIG failed to respond to a disclosure of AUO abuse she made directly to that office prior to filing with OSC. In addition, Ms. Hentemann noted, among other things, that the report did not address her contention that certain OSI employees received AUO because of their supervisory status.

I have reviewed the original disclosures, the agency reports, and Ms. Hentemann's comments. Based on that review, I have determined that the agency's reports contain all of the information required by statute and the findings appear reasonable. I thank all the whistleblowers who shed light on AUO abuse and commend them for their dedication to bring about significant change.

As I communicated to you by letter dated March 11, 2015, I am pleased to report that OSC's work with these and other whistleblowers prompted a series of significant reforms by DHS with regard to AUO.³ These two reports, as well as the previous reports, confirmed that DHS employees misused AUO by claiming it for work that did not appear to be properly compensable as AUO and/or by failing to adequately document the work performed to justify the receipt of AUO. The resulting reforms to combat AUO misuse included a department-wide AUO directive to ensure lawful and consistent overtime pay administration, as well as a position-by-position review and decertification of jobs that do not meet all legal requirements for claiming AUO. Particularly significant to these matters, the reforms included termination of AUO by USCIS OSI employees and the de-authorization for AUO pay of a significant number of CBP positions.

Additionally, in response to the concerns raised by the whistleblowers, Congress held hearings on AUO at DHS, required a Government Accountability Office (GAO) audit of AUO use, and enacted the Border Patrol Pay Reform Act of 2014, which took effect on January 1, 2016. The new law permits Border Patrol agents assigned to border areas and field offices to continue working extended hours but curtails the use of AUO by agents assigned to headquarters or training positions. These latter two duties were singled out in investigative findings for improperly claiming AUO when the work assignments did not meet the legal requirements for the use of AUO.

³ The March 11, 2015 letter is available in OSC's public file, which is online at www.osc.gov.

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As required by 5 U.S.C. § 1213(e)(3), I have sent copies of this letter, the agency reports, and Ms. Hentemann's 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 this letter, the agency reports, and Ms. Hentemann's comments in our public file, which is available online at www.osc.gov, and closed the matter.

Respectfully,

A handwritten signature in cursive script, appearing to read "Carolyn N. Lerner".

Carolyn N. Lerner

Enclosures