



U.S. Immigration
and Customs
Enforcement

October 3, 2014

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-14-0416

Dear Ms. Lerner:

In accordance with Title 5, United States Code (USC), 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), Salem, Virginia, sub-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.

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 Title 5, USC, Section 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 OSC retain ICE's FOUO markings and convey the sensitivities of the identifiable information contained in the report.

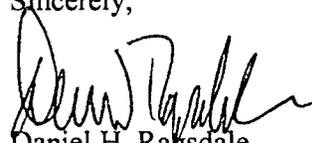
The second version of the report has been redacted to eliminate references to privacy-protected information and is suitable for release in accordance with the Freedom of Information Act (FOIA), 5 USC Section 552. ICE has redacted the names and positions of law enforcement officers pursuant to FOIA exemptions (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-14-0416

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

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 Salem, Virginia: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 February 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 the Supervisory Detention and Deportation Officer (SDDO), continually claim two to four hours of AUO daily. The whistleblower alleged these employees are claiming AUO while performing pre-planned or administratively controllable work, such as processing paperwork, pre-planned surveillance, and other administrative duties, and thus, their work does not justify the receipt of AUO. The whistleblower alleged that it is common practice for employees to take one-hour breakfast, midday, and lunch breaks. As a result, even on days when there is sufficient work during AUO hours, the whistleblower explained that the work could have been completed during an eight-hour shift if employees did not take three hours of breaks. Further, the whistleblower alleged that employees stay past their eight-hour shifts and claim AUO even when there is no work to be completed. The whistleblower alleged that on these occasions employees claim AUO while sitting at their desks, looking for other jobs, watching online videos, and playing with their smartphones. The whistleblower also alleged that while concerns regarding improper AUO use have been brought to the SDDO's and management's attention, the practice is sanctioned and encouraged.

On April 24, 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 all of the employees currently authorized for AUO at ERO Salem, including the SDDO, two Deportation Officers (DOs), three Immigration Enforcement Agents (IEAs), and an Assistant Field Office Director (AFOD), who manages the office and is located in Fairfax, Virginia. The interviews focused on

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 employees' understanding of AUO, the training they received on AUO, and the specific mission-related duties they accomplish while claiming AUO.

The following employees were interviewed during the OPR investigation:

- AFOD - [REDACTED]
- SDDO - [REDACTED]
- DO - [REDACTED]
- DO - [REDACTED]
- IEA - [REDACTED]
- IEA - [REDACTED]
- IEA - [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 of the employees covering an 18-month period from October 1, 2012, to March 22, 2014 (a total of 39 pay periods).² While ICE employees validate their hours worked in WebTA, including AUO hours, WebTA does not allow employees to electronically document their justifications for AUO. Instead, these justifications are only documented on the AUO forms. In addition, OPR compared AUO hours approved on the AUO forms with the hours claimed in WebTA to verify the consistency of the AUO hours claimed by the employees. OPR also reviewed the 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).³ 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."

² The six employees in the ERO Salem sub-office documented their AUO on a form issued by the field office rather than the Form G-1012, Record of Hours Worked, to track their AUO hours.

³ 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.

III. Summary of Evidence Obtained from the OPR Investigation

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

The ERO Salem office is a sub-office of ERO Washington and is managed by an SDDO. The office has two DOs, three IEAs, and one Enforcement and Removal Assistant. Six of the seven positions are currently authorized for AUO. The SDDO reports to the AFOD, Washington DC, located in Fairfax, Virginia.

ERO Salem covers the largest geographic area of any ERO office in the state of Virginia. This area of responsibility (AOR) consists of 23 counties and 11 independent cities which house 43 correctional institutions. The AOR for the Salem ERO office consists of approximately 10,000 square miles within southwest Virginia.

The ERO Salem 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 their time spent in ICE custody and reduces the overall cost to the federal government.
- NFOP – 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.
- 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.
- 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).

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.

D. Analysis of AUO Documentation for ERO Salem Employees

OPR reviewed the WebTA records and the AUO forms for all of the employees covering 18 months beginning October 1, 2012, through March 22, 2014 (a total of 39 pay periods). The analysis revealed the following:

- OPR found that during the 18-month review period, 84 percent of the AUO justifications reviewed were deemed insufficient and 16 percent were deemed sufficient.
- Sufficient descriptions include: “Attempted to serve 200 and 286 on (A-file#) at Roanoke City Jail,” “Due to an accident on 181 the subject was delayed arriving at jail for several hours,” “Surveillance with OSP and Duty Phone,” “CAP (State) Processing and roadside pickup with HID Assist with legal sufficiency on [name] surveillance,” and “OP CCV and pick up fugitive street arrest in Wytheville.”
- Insufficient descriptions include: “AUO for CAP supervision,” “secure community [sic],” “preparation of CAP cases/ordering of conviction documents from appropriate Circuit Courts,” “preparation and processing of state CAP cases,” “unscheduled vehicle maintenance,” “weapons maintenance,” “Virtual University,” and “vehicle cleaned and vacuumed.”
- 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, secure communities, OSUP, 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 found AUO justifications provided by three of the six employees were repetitive in nature. One employee used “Secure Community” as a justification 31 times out of 283 instances (11 percent); and “Preparation of State CAP Cases/Ordering of Conviction documents from appropriate Circuit Courts” as a justification 44 times out of 283 instances (16 percent) of total AUO claimed. A second employee used nearly identical justification phrases “[p]rocessing and preparation of local CAP cases” 11 times, “[p]rocessing related to Local CAP” 14 times, and “[p]reparation and processing of local CAP cases” 39 times, accounting for 64 out of 201 instances (32 percent) of total AUO claimed. A third employee used nearly identical justification phrases “AUO for supervising CAP operations” 13 times, “AUO for CAP supervision” 83 times, “CAP supervision” 13 times, and “[s]upervising CAP operations” 23 times, accounting for 132 times out of 220 instances (60 percent) of total AUO claimed.

- The average AUO hours worked for each of the ERO Salem employees was over 604 hours for the 18 months examined (over 3,628 hours total among the six subjects whose records were reviewed). The least amount of AUO worked by any individual subject during this period was 395.75 hours, while the greatest was 738 hours.
- OPR found two of the six employees were at the maximum 25 percent AUO certification allowance throughout the entire review period.
- OPR found that for two employees, AUO hours claimed in WebTA exceeded the number of hours claimed on their AUO form. One employee claimed a total of 5.5 more AUO hours in WebTA than what was claimed on the AUO form. A second employee claimed a total of three more AUO hours in WebTA than what was claimed on the AUO form.

E. Information Obtained from Employee Interviews

OPR conducted interviews of all employees assigned to ERO Salem who receive AUO and the ERO Salem management staff responsible for the review of AUO submissions. During the interviews, all of the ERO Salem employees, including the SDDO, 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 worksheets. When interviewed, AFOD ██████ stated that he had not received any formal training on AUO other than a brief discussion about AUO he received at an ICE leadership management course in 2009.

Interviews of the OPR Salem employees revealed consistent patterns in the documentation and justifications that employees used to document AUO hours. The ERO Salem employees stated they worked AUO on a recurrent basis to accomplish tasks which could not be completed during the course of the normal workday, or that they remained on premises to coordinate or respond to ERO operations occurring after standard business hours that were deemed mission critical. Examples of these operations include transporting federal detainees, by ground or air, to facilities within the ERO Salem AOR or to destinations outside the continental United States; and assisting other officers within ERO Salem to complete their tasks. OPR asked ERO employees about common AUO justifications noted on AUO worksheets. Several employees stated that they claimed AUO for "Processing and Preparation of Local CAP Cases," which included identifying criminal aliens, obtaining information on that specific alien, conducting interviews related to the specific alien, and determining a grounds of admissibility for the alien. DO ██████ explained that he worked "Secure Communities" taskings that consisted of conducting interviews, responding to roadside calls from state and locals, and transporting aliens to the airport for deportation.

During the interviews, employees stated that they have a very limited time frame (48 hours) when notified about a suspected alien, to determine whether the suspected alien is legally present

in the United States.⁵ Within the 48-hour limit, the employees stated that they need to travel to the facility to interview the individual, take biometrics, travel back to the office, conduct records checks on the individual and if determined to be illegally present in the United States, they need to prepare the proper paperwork, have this paperwork approved immediately by the supervisor, then authorized by a judge (if applicable), and then travel back to the jail the individual was located to serve them with the paperwork. The employees stated that although some of the duties required for them to fulfill their responsibilities appeared administrative in nature, if they failed to properly or adequately complete their responsibilities, an individual could be released from custody which would constitute negligence on their part. ERO Salem employees stated they do not claim AUO for hours that they do not work and relied on accepted precedent established during the course of their tenure with ERO.

During his interview, SDDO ██████ stated that he claimed AUO for “AUO for CAP Supervision” and “CAP Supervision,” which included supervising the activity and any of the documents submitted by the ERO employees related to CAP duties. SDDO ██████ explained that it is his responsibility to review the CAP documentation prepared by the ERO employees for sufficiency and accuracy. The SDDO stated that he reviews the recommendation made by the ERO officer to remove the alien from the country and then has to concur with the finding. SDDO ██████ also stated that he would sign the charging document prepared by an ERO Officer. The SDDO stated that the officers and agents have a 48-hour window to research, prepare, receive approval and issue detainers on subjects or the individual will be released from a jail. SDDO ██████ stated that although some of the duties are administrative in nature, it is work that is required to be completed and at times the only available time is after the end of his regular shift.

SDDO ██████ stated that on occasion he found it necessary to solicit greater specificity from employees when they submitted their AUO forms. The SDDO stated that he has previously advised his employees to provide more detail in the description of duties section of the AUO forms. The SDDO further explained that if an employee would use the justification “Processing Local CAP Cases” he would ask the employee to add an alien number or event number referring to the specific case. The SDDO said that in most circumstances he has never had reason to dispute or refute the AUO justifications submitted by employees in the ERO Salem office. The SDDO stated that on one prior occasion, he questioned the AUO justifications and work hours claimed by one subordinate employee, IEA ██████ after possible time and attendance issues were brought to his attention by employees of the ERO Salem office. The SDDO explained that the subordinate employee claimed to be working at a specific jail or conducting a specific tasking during regular work hours and AUO. The SDDO suspected that the employee provided false information regarding his time and attendance. The SDDO stated that these performance and conduct issues for this employee were reported to ERO management and are currently being investigated. OPR has confirmed that the SDDO reported the alleged time abuse of a subordinate employee, IEA ██████ and the allegations are currently being investigated.

⁵ 8 C.F.R. 287.7(d) – Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

AFOD ██████ who oversees the ERO Salem office, was interviewed and advised OPR that he reviews and certifies the AUO forms submitted by the ERO Salem SDDO. The AFOD stated that he verifies the SDDO's AUO sheet by reviewing the description block of the AUO worksheet. The AFOD stated that he also periodically reviews ERO Salem employees AUO worksheets to verify that the AUO justifications have specificity. The AFOD stated that he has never had reason to dispute or refute the AUO justifications submitted by the SDDO ██████ or the employees in the ERO Salem office. AFOD ██████ stated that he believed AUO was appropriately being worked by personnel under his supervision in accordance with his knowledge and understanding of existing policy.

The interviews revealed the following potential AUO abuse:

- IEA ██████ allegedly submitted false time and attendance reports, as well as AUO worksheets.

The whistleblower alleged in their disclosure that all ERO Salem employees have claimed and continue to claim approximately two hours of AUO daily. OPR reviewed the WebTA entries and AUO forms for the ERO Salem office and observed on some days as little as 15 minutes were claimed for AUO while on other days more than 6 hours of AUO were claimed. The OPR investigation did not reveal any patterns to the number or frequency of AUO hours claimed (i.e., the same hours were not claimed on the same days of the week over several weeks). However, as noted previously, there appears to be a lack of detail regarding the justifications submitted for the AUO hours that were worked. This lack of detail makes it extremely difficult for OPR to determine whether the activity is administratively uncontrollable in nature or not.

The whistleblower alleged in their disclosures that ERO Salem employees are claiming AUO worked for pre-planned and/or administratively controllable work, such as pre-planned removals, pre-planned surveillance operations, and administrative duties preparing for other 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 with impending deadlines and for which there was insufficient time to complete them during the course of their regularly scheduled duty hours. The ERO Salem employees provided the following example: if they are normally scheduled to work 0700 hours to 1500 hours, and needed to conduct an enforcement operation at 0600 hours, they would adjust their shift to 0600 hours to 1400 hours. After the enforcement action was concluded, the employees would conduct any remaining administrative duties that were required for that particular day. Administrative duties could include: computer related training, vehicle maintenance, building maintenance, and case file preparation. The interviews also revealed that events may occasionally be planned during the administrative workweek and outside of an employee's scheduled working hours.

The whistleblower alleged that ERO Salem employees remain on duty past their eight-hour shifts and claim AUO even when there is no work to be completed and that ERO Salem employees are sitting around doing nothing while claiming AUO. The interviews conducted failed to develop evidence to substantiate this allegation. The employees interviewed stated that they worked the hours they claimed and that, at times, they had down time while waiting for computer checks to

return, waiting for court documents, waiting for local law enforcement to contact them to retrieve an alien, or they were waiting for other officers to finish processing an alien. The employees stated that depending on the number of aliens, multiple employees were required to assist in the transportation and at times they had to wait at the office until all aliens were processed or for the aliens to arrive in the office to begin the processing.

The whistleblower alleged in their disclosure that ERO Salem employees claim AUO for watching television, movies, and surfing the Internet. Each ERO Salem employee denied watching television, movies, and surfing the Internet. Interviews with the ERO Salem employees revealed that there are times when they are conducting limited personal internet searches, usually while waiting for something else to be completed. OPR found no evidence of employees conducting excessive personal internet searches, and any use is diminutive. Furthermore, since the whistleblower requested anonymity, OPR was unable to interview the whistleblower to obtain additional information regarding this specific allegation.

The whistleblower alleged in their disclosure that ERO Salem employees took numerous extensive breaks throughout the day. Each ERO employee denied taking extensive breaks throughout the day and OPR found no evidence to support this allegation. Since the whistleblower requested anonymity, OPR was unable to interview the whistleblower to obtain additional information regarding this specific allegation.

The whistleblower alleged that concerns regarding improper AUO have been brought to the attention of ERO Salem management and the practice is sanctioned and encouraged. The investigation conducted by OPR failed to substantiate this allegation. The investigation determined that numerous employees advised SDDO ██████ of their belief that IEA ██████ was falsely claiming normal work hours as well as abusing AUO hours. During his interview, SDDO ██████ confirmed that he received information from numerous employees and he reported this abuse to the Joint Intake Center. OPR has confirmed that the SDDO did report the abuse and that an investigation is currently being conducted regarding these allegations. SDDO ██████ denied receiving additional allegations of improper use of AUO and employee interviews and OPR's investigation revealed no other reports.

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 Salem 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.

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 minimal updated agency guidance and lack of training regarding the use of AUO may have contributed to ERO Salem managers approving AUO justifications that, in most circumstances, were either vague in nature or did not qualify for AUO premium pay. Nevertheless, the OPR investigation failed to develop evidence to substantiate this allegation of knowingly approving improper AUO use based on its findings that the ERO management believed the approvals were justified at the time of submission given the prioritization of employee workload for a given day.

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.

G. Investigations of Individual Misconduct

The OPR investigation revealed an instance of potentially intentional misconduct involving AUO, namely that IEA [REDACTED] allegedly submitted false time and attendance reports and AUO worksheets. These issues for this employee were reported to ERO management and are currently being investigated as a separate misconduct allegation and, if warranted, the Agency will take disciplinary action.