



**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 Nos. DI-14-1069, DI-14-1070, DI-14-1071

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), Columbus, Ohio, 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 three Immigration Enforcement Agents (IEAs) 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. The whistleblowers also alleged that employees consistently fail to properly search detainees and remove contraband, and that management has failed to remedy the situation despite repeated notice from the whistleblowers. 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 Title 5, U.S.C., 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 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. 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

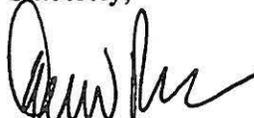
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enforcement officers from possible acts of threat, coercion, and bribery. ICE requests that only the redacted version of the report be made available on your website, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the unredacted report.

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, three Immigration Enforcement Agents¹ (IEAs) assigned to the U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) Columbus sub-office in Columbus, Ohio, made the following allegations to the Office of Special Counsel (OSC) regarding employees in the ERO Columbus sub-office assigned to the Operations/Transportation Section (OTS):

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.

Allegation 3: ERO employees consistently fail to properly search detainees and remove contraband.

Allegation 4: ERO management has failed to remedy the situation despite repeated notices from the whistleblowers.

On April 7, 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 whistleblowers alleged that other employees have claimed and continue to regularly claim approximately two hours of AUO daily. The whistleblowers claimed that because of the low number of detainee cases received and arrests made, the type of work being used to justify AUO is not sufficiently compelling such that a failure to carry it out would constitute negligence. The whistleblowers 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 attending pre-planned removal proceedings, conducting pre-planned surveillance operations, and completing administrative duties to prepare for other operations. The whistleblowers also alleged that employees stay and claim AUO when there is no work to be done, that they “google for AUO,” and the Union has made disparaging remarks about them.

In addition, the whistleblowers alleged that the other IEAs in the ERO Columbus sub-office failed to perform required pat down searches of detainees prior to them being placed into the sub-office hold cells. The whistleblowers indicated that they conduct pat down searches of detainees prior to transporting them to the detention facilities, and the whistleblowers alleged that during these pat down searches, they frequently find contraband and potential weapons. The whistleblowers fear that they will incur serious bodily harm or possible death due to the failure of the other IEAs to properly conduct the initial pat down search and remove all contraband.

¹ The three IEAs will be referred to in this document as the “whistleblowers.” All three consented to the release of their names: [REDACTED], [REDACTED], and [REDACTED].

On April 22, 2014, the matter was assigned to the ICE Office of Professional Responsibility (OPR) for investigation. The Agency received extensions through September 19, 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 the IEAs in the OTS (including the whistleblowers), the Supervisory Immigration Enforcement Agent (SIEA) who oversees the OTS, the Supervisory Detention and Deportation Officer (SDDO), and the Assistant Field Office Director (AFOD). The interviews focused on the employees' understanding of AUO, the training they received on AUO, and the specific mission-related duties they accomplish while claiming AUO. Employees were also questioned about the allegations disclosed by the whistleblowers relating to AUO and officer safety.

The following employees were interviewed during the OPR investigation:

- AFOD – [REDACTED]
- SDDO – [REDACTED]
- SIEA – [REDACTED]
- IEA – [REDACTED] (resigned from ICE)

In addition to the interviews, OPR reviewed WebTA certified Time and Attendance records and the G-1012, Record of AUO Hours Worked (referred to as "AUO form"), for all employees assigned to OTS, including the first- and second-line supervisors, covering a 16-month period beginning January 13, 2013, to May 3, 2014 (a total of 34 pay periods). 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 subjects. 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 the claims presented 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

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.

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).

With respect to the AUO allegations, OPR also reviewed AUO forms and WebTA certified Time and Attendance records for an additional ten employees in the ERO Columbus sub-office to determine whether the patterns and practices of the subjects of the investigation were common throughout the office or unique only to the OTS.

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 Columbus Sub-office

The ERO Columbus office is a sub-office of ERO Detroit and is managed by one AFOD and four SDDOs. The office has 34 filled positions and is divided into six operational program sections, two of which are not currently staffed.³ Thirty of the 34 positions are currently authorized for AUO. The OTS consists of seven IEAs, an SIEA, and an SDDO that supervises the SIEA. The SDDO is supervised by the AFOD, who is the senior management official at ERO Columbus.

The ERO Columbus office is responsible for the daily operations of the following ICE programs:

- 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.
- ICE Air – The primary goal of ICE Air Operations is to provide domestic and international aviation support to the 24 ERO Field Offices strategically located throughout the United States. ICE Air Operations transports aliens ordered removed from the United States to staging sites in order to complete flights to aliens’ countries of origin. 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.

³ The six program sections are: Detained Program, Detention Program (referred to by the whistleblowers as the “Operations/Transportation Section”), Fugitive Operations Program, Criminal Alien Program, Non-Detained Program, and the Alternatives to Detention Program. The Non-Detained Program and Alternatives to Detention Program are not currently staffed.

- 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 area of responsibility (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, meet the flight, and proceed with the next leg of travel.
- 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 who have been previously removed from the United States, removable aliens who have been convicted of crimes, and 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 collaboration with the Offices of the United States Attorneys to prosecute the charged criminal offenders.

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 FODs 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 guidance⁴ regarding AUO. 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).

D. Analysis of AUO Documentation for ERO Columbus OTS Employees

OPR reviewed WebTA certified Time and Attendance records and the Forms G-1012, Record of AUO Hours Worked (referred to as “AUO form”), for the OTS, including the first and second-line supervisors, covering a 16-month period beginning January 13, 2013 to May 3, 2014 (a total of 34 pay periods). The analysis revealed the following:

- OPR found that during the 16-month review period, 79 percent of the AUO justifications reviewed were insufficient and 21 percent were sufficient.
- Sufficient descriptions included: “Call from United pilot in regard to verify flight,” “CAP processing and jail screenings work late and transport to MCCF,” “After Hours response to FSM escort,” “Surveillance with OSP and Duty Phone,” “CAP (State) Processing and roadside pickup with HIDTA,” “Phone call from Morrow county about detainee in hospital,” “8 hours OT - ICE Air - Flight was super late.”
- Insufficient descriptions included: “CAP,” “SIEA/Coordinate Transport,” “Transport and Processing,” “duty phone,” “ICE Air,” “OP’S, JPATS,” “office coverage for bonds,” “training,” “File Cabinet Review,” “Writing/Editing PWP’s,” “ELR Training in Detroit,” “Certifying time and attendance reports,” “Filling out MWR Golf outing sponsorship/donation applications.”

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.

- Justifications that clearly met the AUO criteria were considered “sufficient” by OPR. Justifications that included duties considered administrative, regular, or that 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 of the audit, OPR found that a majority of the AUO justifications reviewed were insufficient. A number of justifications referencing operational activities, such as CAP, 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 justifications were included in the insufficient category.
- OPR found that the AUO justifications provided by several OTS employees were often repetitive in nature. For example, one employee used the phrase “SIEA/Coordinate transport” 242 times out of 304 total instances of AUO claimed by the employee (80 percent of the justifications). When asked to provide specific examples of what mission critical duties he completed while claiming AUO, SIEA █████ responded that he would approve the late runs to the jails, approve bonds, ICE AIR related activities, and Voluntary Departure packets. IEA █████ used the acronym “CAP” 81 times and the acronym “OP’S” 34 times, accounting for a combined 115 times out of 277 total instances of AUO claimed by the employee (42 percent of the justifications). When questioned about what mission critical duties she completed while claiming AUO, the employee stated that she took after hours duty calls, waited for results from Immigration Court to prepare documents for meet and greets and voluntary departures, and ICE AIR. The employee additionally stated that “CAP” was used repetitively to sum up all duties associated with the arrest and processing of aliens.
- The average AUO hours worked for each of the OTS employees was over 570 hours for the 16 months examined (over 3,421 hours total among the six subjects whose records were reviewed). The least amount of AUO worked by any individual subject within OTS during this period was 509 hours, while the greatest was 662.75 hours.
- OPR found that five of the six subjects were certified for AUO at the maximum 25 percent rate throughout the entire review period.
- OPR identified 12 instances where ERO Columbus could not provide AUO forms during the review period. One employee was missing 11 AUO forms, covering 188 AUO hours. A second employee was missing one AUO form, covering 14.5 AUO hours. During his interview, IEA █████ stated that he would always submit an AUO form to his supervisor, and if he did not, his supervisor will not approve his WebTA entry. The employee further stated that he does not maintain a copy of the AUO form, as it is not required and the submitted form is provided to the office timekeeper for retention. The SIEA stated that he will not approve an employee’s WebTA entry without reviewing an AUO form and providing the form to the timekeeper for retention. ERO Columbus was unaware that AUO forms were missing and, as a result of the OPR investigation, ERO Columbus implemented an office-wide process to ensure that all AUO forms are accounted for in the future.

E. Review of AUO Documentation for Additional Sample of ERO Columbus Employees

OPR additionally conducted a review of 5,774 total AUO hours claimed by an additional ten ERO Columbus AUO-eligible employees during the review period of January 13, 2013, to May 3, 2014. Practices with respect to documentation of AUO on the required forms and in WebTA were relatively consistent across the ERO Columbus sub-office, and were not unique to the six subjects of the investigation. The analysis revealed the following:

- OPR found that during the 16-month review period, a total of 94 percent of the AUO justifications reviewed for the additional sample of 10 employees were insufficient and only 6 percent were sufficient.
- Sufficient descriptions include: “Detainee communication,” “ICE Air wrap-up and two consulate interviews that went late,” “medicals, and last minute add-ons for flight,” “awaiting issuance of five travel documents for 4/2 flight, four from the Guatemala Consulate and one from Honduras after calling the main embassy in DC,” “pre-shift - crim alien surveillance and arrest HIDTA - criminal surveillance/arrest,” interviewed state inmates at CRC,” “Somali surveillance.”
- Insufficient descriptions include: “File clean up and close out detained cases that have left.” “Since EARM is up, review case files from last week, and complete emails and filing,” “furlough,” “duty,” “system checks,” “travel docs,” “file reviews,” “defensive tactics training,” “admin,” “court records,” “VU course,” “supervisory duties,” “yearly equipment inventory.”
- The justifications provided by the additional ten employees were repetitive in nature, similar to those provided by the subjects of the investigation. For example, an employee used the phrase “Fugitive Operations” 151 times out of 205 total instances of AUO claimed by the employee (74 percent of the justifications). A second employee used the phrase “CAP SDDO Duties” 221 times out of 282 total instances of AUO claimed by the employee (78 percent of the justifications).
- The average AUO hours worked per subsequent employee was over 577 hours for the 16 months examined (5,774 hours total among the ten subsequent employees whose records were reviewed). The least amount of AUO worked by any individual employee during this period was 403.75 hours, while the greatest was 738.5 hours.
- OPR found that eight of the ten additional employees were certified for AUO at the maximum 25 percent rate.
- OPR identified 16 instances where AUO forms were missing, but hours were still claimed as AUO hours in WebTA during those relevant pay periods. As with the six subjects, the WebTA records for this other group of employees were certified by the employees’ supervisor(s); however, those AUO forms were not able to be produced when requested by OPR during the investigation. The missing forms account for approximately 294 AUO hours for four of the ten employees.

- OPR identified 20 instances where more AUO hours were claimed in WebTA than what was claimed and approved on the AUO forms, resulting in an overage of 24 hours by five of the ten employees. One employee was responsible for 11 overages, totaling 19 hours.

F. Information Obtained from Employee Interviews

OPR conducted interviews of all employees assigned to the OTS who receive AUO and the ERO Columbus management staff responsible for the review of AUO submissions.⁵ During the interviews, all of the OTS employees (including the whistleblowers) as well as their managers (i.e., the SIEA, SDDO, and AFOD) stated that they have never received formal training on AUO, that there has been no refresher training on AUO, that they have never received guidance on what specific duties are permissible when claiming AUO, and that there is no guidance or instructions on the completion of the G-1012 AUO worksheets. AFOD ██████ stated that a Virtual University requirement for supervisors was recently introduced, which is an overview of AUO, but it contains no specifics on which duties are allowed and which are prohibited by AUO. The managers also stated that they did not receive any training on AUO at Supervisory Leadership Training, which is a requirement for all ICE supervisors.

Interviews of the OTS employees revealed consistent patterns in the documentation and justifications that employees used to document AUO hours. The OTS employees stated that they worked AUO on a recurrent basis to accomplish tasks that 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 Columbus AOR or to destinations outside the continental United States, and assisting other sections within ERO Columbus to complete their task. A majority of OTS employees stated that they do not claim AUO for hours that they do not work. The OTS employees also reported having never received any formal training in the types of duties that may warrant AUO, and being unable to adequately locate or obtain practical reference material to educate themselves as to its proper application. The OTS employees stated that they have relied instead on accepted precedent established during the course of their tenure with ERO. The OTS employees reported that the SIEA assigned to oversee the OTS never questioned the validity of their AUO forms. SIEA ██████ further admitted that he never scrutinized or questioned employees when they used the same justifications for AUO repeatedly, nor did he notice any recurring patterns regarding the use of AUO justifications from his subordinate employees.

AFOD ██████ at ERO Columbus stressed the necessity of AUO as the only available means to compensate employees for attending to law enforcement duties occurring at unscheduled and unpredictable intervals on any given day. The AFOD indicated that the Administrative Officer at the ERO Detroit office (to which ERO Columbus reports) advised him that an employee cannot be decertified from AUO and that it was the position, not the employee, that is certified. AFOD ██████ added that employees are not ordered to work AUO, and that it is based on the employee's individual workload for a particular day. The AFOD said that when a detainee leaves the ERO Columbus office and is detained at a contract facility, there is still work that must be completed on the detainee file and in the detainee management computer system.

⁵ Interviews were limited to employees in the OTS at the ERO Columbus office. The additional ten employees whose AUO forms and WebTA records were reviewed (to determine whether the patterns and practices of the subjects were common throughout the office) were not interviewed by OPR.

Although this work may seem administrative in nature, it is considered mission critical due to deadlines and current agency priorities. For example, if a detainee is housed in a specific facility and that information is not entered promptly, the whereabouts of a detainee can be unknown, payment to the contract facility can be withheld, or statistics tracking detention levels can be inaccurate.

AFOD ██████ stated that at times it may seem that employees are sitting at their desk idly; however, they may be waiting for more information to complete a task (e.g., a phone call from the ICE Office of the Principal Legal Advisor or a contract facility, or a detention determination from HQ), or performing an open source search to locate information on an ICE fugitive.

The interviews revealed several instances of potential AUO misuse such as:

- AFOD ██████ acknowledged changing 45 Act⁶ overtime to AUO, so that IEA ██████ could keep her AUO percentage at 25 percent.
- IEA ██████ acknowledged that he would sit around for two hours a day playing on his phone and “twiddling his thumbs.”
- SIEA ██████ acknowledged previously approving AUO for duties that were not mission critical.
- IEA ██████ acknowledged that he was allowed to claim AUO for duties that were administratively controllable, like Performance Plans, folder preparation, etc.

The whistleblowers alleged in their disclosure that all OTS employees have claimed and continue to claim approximately two hours of AUO daily. OPR reviewed the WebTA entries and AUO forms for the OTS and observed on some days as little as 15 minutes were claimed for AUO while on other days as many as 6.5 hours of AUO were claimed. OPR’s 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, the justifications submitted for the AUO hours that were worked often lack detail. This lack of detail makes it extremely difficult for an approving official or auditor to determine whether the activity is administratively uncontrollable in nature.

The whistleblowers alleged in their disclosures that OTS employees are claiming AUO for pre-planned and/or administratively controllable work, such as pre-planned removals, pre-planned surveillance operations, and administrative duties preparing for other duties. In the disclosure, the whistleblowers indicated that the SIEA stated that FugOps was going out at 3:00 p.m. or 4:00 p.m., and that was scheduling AUO. When asked for additional details regarding this allegation, the whistleblowers acknowledged that they did not know when the information on the ICE fugitive was known by the FugOps team and that it is possible that this timeframe was the best possible time to locate an ICE fugitive. Interviews of the OTS employees and management revealed that although these events are pre-planned, the timing of these events can occur outside of scheduled working hours and within the administrative workweek. For example, a pre-planned removal can be after hours due to commercial flight schedules, a pre-planned

⁶ Overtime under the Federal Employees Pay Act (FEPA) of 1945 is commonly referred to as “45 Act” overtime.

surveillance of an ICE fugitive may occur after hours as this may be the best time to verify a fugitive detainee's current location or criminal activity, and administrative duties preparing for other assignments can be justified based on a change in flight times for a bulk detainee transfer via ICE Air Operations (e.g., last minute flight arrives/departs several hours prior to scheduled time or based on weather-related changes). OTS, consistent with the rest of ERO, is not staffed on a continuous 24-hour basis. Instead, shifts are adjusted or flexed for specific, planned events, but because of the unpredictable nature of many of the law enforcement duties performed, work can be performed throughout a 24-hour day.

ICE ERO Air Operations advised that while they can provide arrival/departure times for a specific flight, they are unable to provide on-time arrival percentages for a specific region within a given timeframe.

The whistleblowers alleged in their disclosure that OTS employees remain on duty past their eight-hour shifts and claim AUO even when there is no work to be completed, often stating that they were leaving at a specific time, and that OTS employees are sitting around doing nothing while claiming AUO. Interviews of the OTS employees, including the whistleblowers, indicated that employees could state when they were leaving the office because they usually had a good estimate of how long tasks will take to complete (e.g., transporting an alien to a local jail takes about two hours to complete). AFOD [REDACTED] additionally offered an example where a law enforcement agency would contact them regarding aliens who had been stopped and detained, requiring ERO to respond, take custody, transport, and administratively process the aliens. In this example, depending on the number of aliens detained, other ERO agents would be asked to remain on duty and assist with the processing of the aliens that were, or would be, en route to the ERO Columbus office. The down time spent by officers waiting for the aliens to arrive at the ERO Columbus office for processing could be seen as "just sitting around."

The whistleblowers alleged in their disclosure that OTS employees claim AUO for watching TV or downloading movies to watch. Interviews of the OTS employees and the managers failed to develop evidence to substantiate this allegation.

The whistleblowers alleged in their disclosure that the SIEA claimed AUO while he plays video games (e.g., Candy Crush) on his phone. SIEA [REDACTED] admitted during his interview to playing video games on his phone while waiting for bond paperwork to come back for his review.

The whistleblowers alleged in their disclosure that the SIEA surfs the internet while claiming AUO. When asked about this allegation during his interview, SIEA [REDACTED] confirmed that this has occurred while he was waiting for something required to complete an official, mission critical task.

The whistleblowers alleged in their disclosure that the AFOD indicated that it is okay to "Google for AUO," meaning it is allowable to "surf the internet" while claiming AUO. During the interview, AFOD [REDACTED] elaborated that several units in ERO Columbus utilize the Google search engine to assist in locating aliens, as well as other Google tools (e.g., Google Maps with Street View to view target locations). The AFOD stated that units in ERO Columbus use tools provided by Google and other public websites to obtain information such as location pictures, satellite views, and floor plans when preparing to execute a warrant at a given location. AFOD [REDACTED] advised that the information obtained from Google and other public websites can

enhance officer safety and further stated that internet informational searches related to accomplishing the ERO mission are within the scope of duties. The AFOD believes that the statement about using Google while on AUO has been misinterpreted. Interviews with the OTS section 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.

The whistleblowers alleged in their disclosure that on November 20, 2013, they received an email from Deportation Officer (DO) [REDACTED], ERO Detroit, MI, disparaging AUO whistleblowers and DHS's attempts to remedy AUO abuse. In the email, DO [REDACTED], a bargaining unit employee, forwarded information to other bargaining unit employees assigned to the ERO Detroit AOR, which includes ERO Columbus. During the OPR interviews, the whistleblowers indicated that they did not believe the email was specifically directed at them or the situation in ERO Columbus because when the email was sent out, they had not been identified as whistleblowers. The whistleblowers also indicated that they have not felt threatened or intimidated in any way.

G. Officer Safety Issues

The referral from the OSC included allegations that OTS employees consistently fail to properly search detainees and remove contraband in violation of local policy, and that ERO Columbus management has failed to remedy the situation despite repeated notices from the whistleblowers. The whistleblowers indicated that many of the contraband items could be used as potential weapons.

OPR reviewed the on-site logbook in the processing area of ERO Columbus. Between January 2, 2013, and May 8, 2014, there were over 2,000 separate entries into the logbook for aliens who had been processed through ERO Columbus. During this timeframe, 19 incidents of prohibited items were disclosed by the whistleblowers, leading to the discovery of a violation in approximately 1 out of every 104 subjects (less than 1 percent of the time).

During the on-site interviews of the ERO Columbus OTS and management staff, all parties acknowledged that there is a written policy in place regarding the requirement of searches to be conducted prior to any detainee's or arrestee's admission to the ERO Columbus facility. According to OTS staff and management, detainees/arrestees are first searched at the initial point of contact with an ERO employee, a second time when they enter the ERO Columbus facility, and a third time prior to their departure from the ERO Columbus holding area. The search policy is also posted in the detention area of the facility and copies of the policy are available to employees, if requested. The search policy is also explicit as to what items and/or personal effects (including articles of clothing) a detainee/arrestee may retain on their person while housed in the ERO Columbus holding cells.

The ERO Columbus management staff stated that they were made aware in late 2013 of a series of incidents where prohibited items were found on detainees/arrestees after their processing and incarceration in the holding area of ERO Columbus. The managers reported that efforts to identify particular employees who may have been responsible for the improper or inadequate searches were, at times, hampered by overlap in the pick-up and processing duties among ERO Columbus personnel, and a prisoner log-in system that does not identify an employee with a

specific detainee/arrestee who is searched. In response to the incidents revealed by the whistleblowers, AFOD ██████ stated that ERO Columbus management held meetings to discuss operational safety with direct participation from OTS employees, and solicited feedback from the employees in an effort to address the safety concerns. Both the OTS employees and management acknowledged that the AFOD also attempted to revise and expand the search policy in an attempt to enhance the detection of contraband and dangerous items, but retracted this decision in part due to the expressed discontent voiced from OTS employees. In addition, ERO Columbus management created a repository in the ERO Columbus computer network for officer safety materials and updates that are accessible to all ERO Columbus personnel.

ERO Columbus management reported that they are unaware of any deliberate or willful failure to follow search policy or blatant disregard of that policy when securing prohibited property from detainees/arrestees. The management also addressed an allegation that employees involved in search oversights were not disciplined. AFOD ██████ stated that he has verbally counseled all four members of his supervisory staff independently of each other, regarding the safety issues brought forth, and added that no employee would be privy to managerial decisions regarding discipline because it is not office practice to apprise any of the non-supervisory personnel at ERO Columbus of disciplinary action levied against another employee. The AFOD further stated that once the safety issues were brought to his attention, he addressed the issues immediately, usually within the same working day or by the next business day at the latest.

The OPR investigation found no evidence to substantiate the following allegations made by the whistleblowers:

- ERO employees consistently fail to properly search detainees and remove contraband.
- ERO management has failed to remedy the situation despite repeated notices from the whistleblowers.

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

The OPR investigation substantiated the following allegations made by the whistleblowers:

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

With regard to the first allegation, the OPR investigation revealed that ERO Columbus 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.

With regard to the second allegation, the OPR investigation revealed that the lack of management oversight, in combination with minimal updated agency guidance and lack of

training regarding the use of AUO, contributed to the vague justifications provided by ERO Columbus employees, which were subsequently approved by ERO Columbus management.

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. ICE began the position-by-position review on April 25, 2014, and plans to have it finalized by September 30, 2014. 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

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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 instances of potentially intentional misconduct related to AUO, to include an AFOD acknowledging that he changed 45 Act overtime to AUO, so that an IEA could keep her percentage at 25 percent. Additionally, an IEA acknowledged that he would sit around for two hours a day playing on his phone and twiddling his thumbs. These instances will be investigated as separate misconduct allegations and, if warranted, the Agency will take disciplinary action.

H. Officer Safety Allegations

With regard to the disclosures concerning officer safety and contraband, the OPR investigation revealed that the allegations are not substantiated. However, the Agency is committed to the safety of its employees, the public, and all aliens in its custody. The investigation found that the AFOD in the Columbus sub-office has verbally counseled all four members of his supervisory staff regarding the safety issues. Additionally, local management has held meetings to discuss operational safety and to solicit feedback from employees to address the safety concerns. Local management has also created a repository for officer safety materials and updates, which is accessible to all ERO Columbus personnel.