



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

June 29, 2016

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

Re: OSC File Nos. DI-14-1069; DI-14-1070; DI-14-1071

Dear Mr. President:

Pursuant to my duties as Special Counsel, I am forwarding to you an agency report and supplemental report provided to me in response to disclosures received from three employees at the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Enforcement Removal Operations (ERO), Columbus, Ohio. The whistleblowers, David Tanana, Thomas Sparrow, and Robert Blanton, III, who consented to the release of their names, were immigration enforcement agents and alleged that employees improperly claimed administratively uncontrollable overtime (AUO).¹ They also alleged that ERO employees failed to properly search detainees for weapons and contraband. I have reviewed these reports and, in accordance with 5 U.S.C. § 1213(e), provide the following summary of the agency investigation and my findings.²

These three cases are the latest in a series of disclosures alleging widespread abuse of AUO at DHS. On March 11, 2015, and on March 24, 2016, I sent you letters concerning this issue and the reforms initiated as a result of whistleblowers disclosing information to the Office of Special Counsel (OSC).³ As in previous reports received from DHS on this subject, the report in these cases substantiated the whistleblowers' allegations that employees claimed AUO but did not perform qualifying duties prescribed

¹ Messrs. Tanana, Sparrow, and Blanton are jointly referred to as "whistleblowers."

² OSC is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g). Upon receipt, I review the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). I will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

³ The cases closed on March 11, 2015 were OSC File Nos. DI-12-1105; DI-13-1556; DI-13-2853; DI-13-3516; DI-13-4124; DI-14-0581; DI-14-0631; DI-14-1093; DI-14-1100; and DI-14-1637. The cases closed on March 24, 2016 were OSC File Nos. DI-13-3418 and DI-14-0666.

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by federal regulations, and that management knowingly approved improper AUO use. The investigation also identified deliberate misconduct related to AUO abuse. The agency took a variety of measures to ensure future AUO administration is consistent with the law.

With respect to the whistleblowers' allegation that ERO employees failed to properly search detainees for weapons and contraband, the reports found that, in late 2013, ERO Columbus management was made aware of a series of incidents in which prohibited items were found on detainees/arrestees after their processing and incarceration in the holding area of ERO Columbus. As a result, agency management took action to improve officer safety. Because the agency could not identify particular employees who may have been responsible for the inadequate searches and because they were not aware of any deliberate or willful failure to follow search policy, the allegations were not substantiated.

OSC referred the whistleblowers' allegations to Secretary of Homeland Security Jeh Charles Johnson to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). Secretary Johnson delegated authority to review and sign the responding reports to ICE Deputy Director Daniel H. Ragsdale. ICE's Office of Professional Responsibility (OPR) was charged with investigating the allegations. Mr. Ragsdale submitted the agency's initial and supplemental reports to OSC on September 19, 2014, and January 1, 2015, respectively. The whistleblowers declined to comment on the agency reports.

The Whistleblowers' Disclosures

The whistleblowers disclosed that all employees within ERO's Operations and Transportation Section (OTS), including supervisors, claimed AUO while performing pre-planned and/or administratively controllable work that did not justify the receipt of AUO. Examples of such work included pre-planned removal of detainees, surveillance of fugitive immigrants, and completing administrative tasks for other operations. Further, the whistleblowers alleged that management knowingly approved improper AUO use.

The whistleblowers also disclosed that employees improperly patted down detainees before placing them into local holding areas and that the failure to remove all prohibited items could have resulted in serious bodily harm or death. The whistleblowers explained that OTS transports detainees between holding rooms and local ICE detention facilities. According to agency guidelines, before placement in a local holding area or transport to an ICE detention facility, employees must search the detainees for any weapons or contraband to ensure safety during transport. In support of their allegations, the whistleblowers explained that they frequently found weapons and contraband on the detainees prior to transport, after the required pat-down was allegedly conducted.

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The Agency Reports

The agency substantiated the allegation that employees claimed AUO but failed to perform qualifying duties. The investigation revealed that 79 percent of the reviewed OTS employees' AUO justifications were insufficient. In order to determine whether improper AUO abuse was office-wide or limited to OTS, OPR conducted an additional review of AUO documents, and found that 94 percent of AUO hours were not properly claimed. The investigation also found that ERO management knowingly approved improper AUO use. Significantly, the investigation revealed instances of potentially intentional misconduct related to AUO, such as a supervisor who misclassified overtime as AUO in order to benefit a subordinate employee. The initial agency report stated that this type of misconduct would be investigated separately to determine if disciplinary action was warranted. Follow-up information received from the agency indicated that the investigations were conducted but that no further action was taken.

In addition to the deliberate misconduct, the investigation identified inconsistent timekeeping practices, such as compensating employees for more overtime hours than reflected on the AUO forms and missing AUO forms. OSC requested additional information about this conduct and whether it warranted disciplinary action. The agency responded that these timekeeping errors were either administrative or had no apparent explanation. According to the agency, the investigation found no evidence that such conduct was caused by more than a lack of due diligence.

With respect to the whistleblowers' allegations that employees failed to properly pat-down detainees, the investigation revealed "a series of incidents" in late 2013 in which weapons or contraband were found on detainees after they were processed and allegedly searched. The initial agency report noted that supervisory staff members involved in search oversight were verbally counseled regarding the safety concerns alleged and that the assistant field office director addressed safety issues brought to his attention on the same working day or by the next business day. In addition, management took additional steps, such as holding meetings to discuss safety concerns and creating an easily accessible repository for safety materials and updates to ensure officer safety. However, as noted previously, the agency did not substantiate the whistleblowers' allegation that employees did not properly search detainees.

The Special Counsel's Findings

I have reviewed the original disclosures and the agency reports. Based on my review, as well as DHS and ICE officials' commitments in these and other matters regarding comprehensive efforts to ensure the proper administration of AUO, I have determined that the agency's reports contain all of the information required by statute and the findings appear reasonable. I thank Mr. Tanana, Mr. Sparrow, and Mr. Blanton for coming forward. Their disclosure will result in more progress in the proper administration of AUO.

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

Respectfully,

A handwritten signature in black ink, appearing to read "Carolyn Lerner", with a long horizontal flourish extending to the right.

Carolyn N. Lerner

Enclosures